(14)

No. 06-618
Title: Office of Senator Mark Dayton, Appellant
v.
Brad Hanson
Docketed: November 3, 2006
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (04-5335)
Decision Date: August 18, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 3 2006	Statement as to jurisdiction filed. (Response due December 4, 2006)
Nov 16 2006	Order extending time to file response to jurisdictional statement to and including December 18, 2006.
Dec 18 2006	Motion to dismiss or affirm filed by appellee Brad Hanson.
Dec 21 2006	Opposition to motion of appellant Office of Senator Mark Dayton filed.
Jan 3 2007	DISTRIBUTED for Conference of January 19, 2007.
Jan 3 2007	Suggestion of mootness filed by appellant Office of Senator Mark Dayton. (Distributed)
Jan 16 2007	Opposition of appellee to the suggestion of mootness filed. (Distributed)
Jan 19 2007	Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. In addition to the Question presented by the statement as to jurisdiction, counsel are directed to brief and argue the following Questions: 1) Was the Office of Senator Mark Dayton entitled to appeal the judgment of the Court of Appeals for the District of Columbia Circuit directly to this Court? 2) Was this case rendered moot by the expiration of the term of office of Senator Dayton? The Chief Justice took no part in the consideration or decision of this case.
Feb 5 2007	SET FOR ARGUMENT ON Tuesday, April 24, 2007.
Feb 13 2007	Record received from U.S.C.A. for District of Columbia Circuit. (1 envelope)
Feb 27 2007	Joint appendix filed.
Feb 27 2007	Brief of appellant Office of Senator Mark Dayton filed.
Mar 5 2007	Brief amicus curiae of President Pro Tempore of the Senate of Pennsylvania filed.
Mar 8 2007	CIRCULATED.
Mar 30 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent.
Mar 30 2007	Docket sheet received from U.S.D.C. for the District of Columbia Circuit. This case is Electronically filed.
Apr 3 2007	Brief amicus curiae of AARP filed. (Distributed)
Apr 3 2007	Brief amicus curiae of United States Senate filed. (Distributed)
Apr 3 2007	Brief of appellee Brad Hanson filed. (Distributed).
Apr 3 2007	Brief amici curiae of Congressmen Barney Frank and Christopher Shays filed. (Distributed)
Apr 12 2007	Motion of United States Senate for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 13 2007	Motion of United States Senate for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. The Chief Justice took no part in the consideration

	or decision of this motion.
Apr 16 2007	Reply of appellant Office of Senator Mark Dayton filed. (Distributed)
Apr 24 2007	Argued. For appellant: Jean M. Manning, Senate Chief Counsel for Employment, Washington, D.C. For appellee: Richard A. Salzman, Washington, D.C.; and Thomas E. Caballero, Assistant Senate Legal Counsel, Washigton, D.C. (for United States Senate, as amicus curiae.)

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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

JEAN M. MANNING
Senate Chief Counsel for Employment
Counsel of Record

TOBY R. HYMAN
Senate Senior Counsel for Employment

OFFICE OF SENATE CHIEF
COUNSEL FOR EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
(202) 224-5424

QUESTION PRESENTED

1. Does the Speech or Debate Clause of the U.S. Constitution, U.S. CONST. art. I, § 6, cl. 1, bar federal court jurisdiction of an action brought under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438 (2000), by a congressional employee whose job duties are part of the due functioning of the legislative process?

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In the Supreme Court of the United States

No.

OFFICE OF SENATOR MARK DAYTON,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT[1]

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit (App. 1a-57a)[2] is reported at 459 F.3d 1. The underlying "decision" of the U.S. District Court for the District of Columbia is an unreported minute order. A copy of the relevant portion of the district court docket sheet with the

[1] If the Court finds that this appeal is improvidently taken and that the sole mode of review of the judgment of the court of appeals is by petition for writ of certiorari, Appellant respectfully requests that this Court treat these papers as a petition for writ of certiorari.

[2] The pages of the appendices to the jurisdictional statement, attached hereto, are referred to as App. ____.

minute order entry listed after docket entry No. 20 is reprinted at App. 58a-59a.

JURISDICTION

The U.S. Court of Appeals for the District of Columbia Circuit entered judgment on August 18, 2006. (App. 60a-61a.) Appellant filed its notice of appeal on October 31, 2006.[3] (App. 90a-94a.) This Court has appellate jurisdiction under section 412 of the Congressional Accountability Act of 1995, 2 U.S.C. § 1412. (App. 65a.) Alternatively, if this Court treats these papers as a petition for writ of certiorari, jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Speech or Debate Clause of the United States Constitution, U.S. CONST. art. I, § 6, cl. 1, provides in relevant part that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." Article I, Section 6, Clause 1 is reproduced at App. 62a.

STATUTORY PROVISIONS INVOLVED

1. Section 413 of the Congressional Accountability Act of 1995, 2 U.S.C. § 1413, is reproduced at App. 63a.

2. Sections 408(a) and (b) of the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1408(a) and (b), are reproduced at App. 64a.

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[3] The mandate of the court of appeals issued on October 19, 2006. Appellant has filed a notice of appeal to this Court in both the court of appeals and the district court.

STATEMENT

This case addresses the scope of the immunity of the Speech or Debate Clause of the U.S. Constitution in employment law actions brought under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438 (2000) (the "CAA" or "Act"), against United States congressional offices. The D.C. Circuit, sitting en banc, interpreted CAA § 413, 2 U.S.C. § 1413, in a manner that permits court adjudication of CAA cases in violation of the Speech or Debate Clause. The circuit court held that the Speech or Debate Clause is not a jurisdictional bar to this case but that the Clause plays some role in the adjudication of CAA cases; however, the court could not reach a majority opinion as to what that role is. While recognizing that this is "an important case," raising "perplexing questions," App. 31a, 13a, the circuit court provided no clear guidance on how CAA cases can be adjudicated without violating the Constitution.

1. The CAA applies select provisions of eleven federal employment laws to United States congressional offices. 2 U.S.C. § 1302(a). The CAA provides two alternative means of redress: an administrative hearing through the Office of Compliance, which is "an independent office within the legislative branch," 2 U.S.C. § 1381(a), and a civil action in federal district court. 2 U.S.C. § 1404. The CAA provides that only a congressional "employing office" shall be a defendant in a CAA suit. 2 U.S.C. § 1408(b). Although the CAA provides a limited waiver of the sovereign immunity of congressional offices, the Act expressly preserves Speech or Debate Clause immunity. See 2 U.S.C. § 1413. The Speech or Debate Clause "insure[s] that the legislative function the Constitution allocates to Congress may be performed independently" and that the "wisdom of congressional approach or methodology is not open

to judicial veto." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502, 509 (1975).

2. Brad Hanson ("Hanson") is a former employee of the Office of Senator Mark Dayton ("the Dayton Office"). Senator Dayton represents the state of Minnesota. As an employee of the Dayton Office, Hanson regularly met with constituents, community groups, and community leaders to determine their priorities in the healthcare and law enforcement areas. Based on information he gathered from them, he identified and briefed Senator Dayton about opportunities for legislative initiatives. App. 67a-71a, 74a-81a. For example, having learned of problems in Medicare reimbursement for ambulances, Hanson held meetings around Minnesota to determine the extent and scope of the problems, developed potential legislative solutions, and advised Senator Dayton that he should sponsor specific legislation and should hold a congressional hearing to address the problems, which Senator Dayton then did. Hanson was one of a few staff members who planned the hearing Senator Dayton initiated and chaired, decided on the issues for the hearing, selected hearing witnesses, and prepared questions that Senator Dayton asked at the hearing. Hanson also developed follow-up questions that were submitted for the official hearing record. App. 71a-73a, 82a-89a.

3. On May 29, 2003, Hanson filed suit in the United States District Court for the District of Columbia alleging that the Dayton Office had discriminatorily terminated his employment and had failed to pay him overtime in violation of sections 201(a)(3), 202(a), and 203 of the CAA, 2 U.S.C. §§ 1311(a)(3), 1312(a), and 1313, respectively. On September 12, 2003, the Dayton Office moved to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that the Speech or Debate Clause provides the Dayton Office with absolute immunity from the suit. Without hearing oral

argument, the district court issued a minute order on September 7, 2004, denying the motion to dismiss. App. 59a.

4. The Dayton Office appealed from the district court's denial of its motion to dismiss for lack of subject matter jurisdiction. The case was heard before the en banc court upon order of the D.C. Circuit.[4]

In a fragmented decision, the D.C. Circuit affirmed the district court's order denying the Dayton Office's motion to dismiss. App 27a, 28a, 57a, 60a-61a. The D.C. Circuit rejected the test it had established in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), that "a Member's personnel decision is shielded from judicial scrutiny when 'the [affected] employee's duties were directly related to the due functioning of the legislative process.' [*Browning*, 789 F.2d] at 929 (emphasis removed)." App. 9a (first alteration in original). See also App. 18a, 27a, 28a, 36a, 45a. Aside from the *Browning* test, the only issues on which at least a majority of the circuit court judges agreed are: (i) the Speech or Debate Clause does not bar the court's jurisdiction of Hanson's suit because an examination of the complaint shows that Hanson can make out a prima facie case without relying on legislative acts, App. 20a, 28a, and (ii) the Speech or Debate Clause plays some role in the adjudication of CAA cases. App. 21a, 28a, 31a, 54a. The court was unable to reach consensus on what that role is. Having rejected that the Speech or Debate Clause is a jurisdictional bar to Hanson's suit, Circuit Judge Randolph, joined by Chief Judge Ginsburg and Circuit Judges Henderson and Tatel, found that where the defendant "provide[s] evidence of a legitimate nondiscriminatory reason for the discharge" and "include[s] with this evidence an

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[4] No three-judge panel argument was heard.

affidavit from an individual eligible to invoke the Speech or Debate Clause recounting facts sufficient to show that the challenged personnel decision was taken because of the plaintiff's performance of conduct protected by the Speech or Debate Clause," App. 25a, then "the action most likely must be dismissed," App. 26a, because "[i]n many cases, the plaintiff would be unable to [demonstrate that the defendant's proffered reason was a pretext for discrimination] without 'draw[ing] in question' the legislative activities and the motivations for those activities asserted by the affiant – matters into which the Speech or Debate Clause prohibits judicial inquiry." App. 25a (citation omitted) (last alteration in original). Circuit Judge Brown, with whom Circuit Judges Sentelle and Griffith joined, concurring in the judgment, found that the Speech or Debate Clause "functions [in CAA cases] only as a testimonial and documentary privilege, to be asserted by members and qualified aides if they are called upon to produce evidence" regarding legislative acts, but that "as long as members and their aides are not themselves 'questioned,' an inquiry into legislative acts does not implicate the Speech or Debate Clause." App. 56a. Circuit Judge Rogers, concurring in part and in the judgment, "agree[d] that the [Speech or Debate] Clause's evidentiary privilege has a role to play," App. 28a (internal citations omitted), but "le[ft] open the question of how the Clause may limit evidence offered by parties in CAA litigation." App. 29a.[5]

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[5] Shortly before the Dayton Office filed its appeal with the D.C. Circuit, the Office of Representative Eddie Bernice Johnson also appealed to the D.C. Circuit from the denial of a motion to dismiss a CAA suit that had been brought against it. Like the Dayton Office, the Office of Representative Johnson had moved to dismiss for lack of jurisdiction based on Speech or Debate Clause immunity. App. 7a, 38a. On appeal, the D.C. Circuit, sitting en banc, heard argument on that case and the case at bar on the same day and issued one decision with respect to both cases, although the circuit court did not consolidate the cases. App. 3a; see also 1a-57a.

THE QUESTION PRESENTED IS SUBSTANTIAL

In CAA § 412, Congress vested this Court with appellate jurisdiction of any "interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this Act," and stated that this Court "shall, if it has not previously ruled on the question, accept jurisdiction over the appeal . . . and expedite the appeal to the greatest extent possible." 2 U.S.C. § 1412(a), (b). Congress considered various versions of the CAA over multiple years prior to passing the Act. Early draft bills of the CAA did not expressly preserve Speech or Debate Clause immunity. At the time Congress added CAA § 413, 2 U.S.C. § 1413, expressly preserving Speech or Debate Clause immunity, it also added CAA § 412.[6] By simultaneously adding those sections, Congress demonstrated that a claim challenging a court's application of CAA § 413 is substantial and should be resolved definitively by this Court. The D.C. Circuit's judgment allows court adjudication of a suit challenging a Member's personnel actions with respect to an employee whose job duties were part of the due functioning of the legislative process, thereby violating the Speech or Debate Clause's bar of court adjudication of suits predicated on legislative acts or that question the motivation for such acts. See *United States v. Brewster*, 408 U.S. 501, 512 (1972); *Doe v. McMillan*, 412 U.S. 306, 318 (1973). This Court has not previously ruled on how the Speech or Debate Clause affects CAA cases. Thus, this case falls within the Court's jurisdiction under 2 U.S.C. § 1412.

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[6] Compare S. 2, 104th Cong. (1995), with H.R. 1, 104th Cong. (1995); see also 141 Cong. Rec. H90-94, 104 (daily ed. Jan. 4, 1995); 141 Cong. Rec. S767-79 (daily ed. Jan. 11, 1995); 141 Cong. Rec. S918 (daily ed. Jan. 12, 1995); 141 Cong. Rec. D72 (daily digest Jan. 23, 1995).

I. THE D.C. CIRCUIT'S FRAGMENTED DECISION PERMITS EMPLOYMENT LAW ACTIONS BY CONGRESSIONAL EMPLOYEES TO PROCEED IN VIOLATION OF THE SPEECH OR DEBATE CLAUSE OF THE U.S. CONSTITUTION

A. The Speech Or Debate Clause Bars Judicial Intrusion Into A Member Of Congress's Management Of Employees Whose Job Duties Are Part Of The Due Functioning Of The Legislative Process

The Speech or Debate Clause is grounded in separation of powers principles that are necessary "to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). The "central role" of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617 (1972) (citing *United States v. Johnson*, 383 U.S. 169, 181 (1966)). The Clause "insure[s] that the legislative function the Constitution allocates to Congress may be performed independently," *Eastland*, 421 U.S. at 502, and that the "wisdom of congressional approach or methodology is not open to judicial veto," *id.* at 509. The Speech or Debate Clause "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *Brewster*, 408 U.S. at 525. See also *Eastland*, 421 U.S. at 508.

"Without exception, [this Court's] cases have read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501; see, *e.g.*, *Brewster*, 408 U.S. at 516 ("In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to

slander and even destroy others with impunity, but that was the conscious choice of the Framers."); *Gravel*, 408 U.S. at 618 ("Rather than giving the Clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from . . . judicial oversight that realistically threatens to control his conduct as a legislator."); see also *Coffin v. Coffin*, 4 Mass. 1, 27 (1808) (the Clause "ought not to be construed strictly, but liberally, that the full design of it may be answered . . . . [The privilege] secur[es] to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office.").[7] Thus, this Court has determined that the Speech or Debate Clause governs more than just speeches and debates on the floors and at committee hearings of the House and Senate. The Clause protects *all* acts that are within the "legitimate legislative sphere." *Eastland*, 421 U.S. at 503. "Congressmen and their aides are immune from liability for their actions within the 'legislative sphere,' *Gravel v. United States*, [408 U.S.] at 624-25, even though their conduct, if performed in other than legislative contexts, would, in itself, be unconstitutional or otherwise contrary to criminal or civil statutes." *McMillan*, 412 U.S. at 312-13; see also *Eastland*, 421 U.S. at 501.

An act is within the legislative sphere when it is "part of the legislative process – the *due* functioning of the process." *Brewster*, 408 U.S. at 516; see *McMillan*, 412 U.S. at 317 (unprotected activity is that which is "beyond the apparent needs of the '*due* functioning of the [legislative] process'")

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[7] This Court has stated that *Coffin* "is, perhaps, the most authoritative case in this country on the construction of the provision [Speech or Debate Clause] in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution of the United States, is of much weight." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

(quoting *Brewster*, 408 U.S. at 516) (alteration in original). This Court has further explained that an act is within the legislative sphere if it is

> "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."

Eastland, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625). Among the acts included within the above definition are "communications between [a] Senator and his aides during the term of their employment . . . related to . . . any . . . legislative act of the Senator," *Gravel*, 408 U.S. at 629; and gathering information to inform a member of Congress in the performance of the Member's legislative duties, see *Eastland*, 421 U.S. at 504 ("'[a] legislative body cannot legislate wisely, or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.' *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).") (alteration in original).

Moreover, the Speech or Debate Clause is not merely an evidentiary privilege. Acts within the legislative sphere "may not serve as a predicate for a suit." *McMillan*, 412 U.S. at 318. The Clause protects legislators "'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Eastland*, 421 U.S. at 503 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)). In addition, Speech or Debate Clause immunity is absolute. "We reaffirm that once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is

an absolute bar to interference." *Id.* (citing *McMillan*, 412 U.S. at 314).

Further, this Court has recognized that to fulfill the central purpose of the Speech or Debate Clause, a Member's aides and assistants must be treated as the Member's alter egos.

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause – to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181 (1966) – will inevitably be diminished and frustrated.

Gravel, 408 U.S. at 616-17. See also *Davis v. Passman*, 442 U.S. 228, 254 (1979) ("A Congressman simply cannot perform his constitutional duties effectively, or serve his constituents properly, unless he is supported by a staff in which he has total confidence.") (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

This Court has never directly addressed the issue of whether the Speech or Debate Clause precludes federal court adjudication of congressional personnel actions. The closest this Court has come to addressing the issue is *Passman*, 442 U.S. 228. In *Passman*, a former employee of U.S. Congressman Passman sued him alleging he had discharged her

because of her gender in violation of the Fifth Amendment to the U.S. Constitution. Congressman Passman moved to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the basis that the Speech or Debate Clause provided him with absolute immunity from the claims, and under Rule 12(b)(6) on the ground that no private right of action exists under the Fifth Amendment. *Id.* at 232 n.5. The district court dismissed the case on the 12(b)(6) argument. *Id.* at 232. The en banc Court of Appeals for the Fifth Circuit held that the plaintiff did not have a private cause of action under the Fifth Amendment, but the court did not decide the immunity issue. *Id.* This Court reversed the en banc court of appeals as to its 12(b)(6) holding. *Id.* at 234. While pretermitting whether the Speech or Debate Clause shielded Congressman Passman's conduct, this Court "h[e]ld that judicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause," *id.* at 235 n.11, and stated that the Clause "protects Congressmen for conduct necessary to perform their duties 'within the "sphere of legitimate legislative activity,"'" *id.* (quoting *Eastland*, 421 U.S. at 501).

Two dissenting Justices in *Passman* thought that the Court should have addressed the Speech or Debate Clause immunity issue:

> The present case . . . involves a preliminary question that may be completely dispositive, for, as the Court recognizes, "the [Speech or Debate] Clause shields federal legislators with absolute immunity 'not only from the consequences of litigation's results but also from the burden of defending themselves.' *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)." *Ante*, at 236 n.11. See also *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503.

> If, therefore, the respondent's alleged conduct was within the immunity of the Speech or Debate Clause, that is the end of this case, regardless of the abstract existence of a cause of action or a damages remedy. Accordingly, it seems clear to me that the first question to be addressed in this litigation is the Speech or Debate Clause claim – a claim that is far from frivolous.

442 U.S. at 251 (Stewart, J., joined by Rehnquist, J., dissenting) (first alteration in original).

Three years after *Passman*, this Court decided *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), in which the Court addressed the issue of whether the President is absolutely immune for personnel actions taken against an Executive Branch employee. In *Fitzgerald*, a management analyst with the Department of the Air Force testified before Congress about the Air Force's cost overruns. *Id.* at 734 n.1. The analyst was subsequently terminated, and evidence showed that President Nixon was involved in the termination decision. *Id.* at 733, 737. Suing President Nixon, among others, the analyst alleged that he was terminated in retaliation for his testimony before Congress. The district court denied the President's claim of absolute immunity, and the appellate court summarily dismissed the President's collateral appeal, holding that the President did not have absolute immunity from the analyst's claims. *Id.* at 740-41. Reversing, this Court recognized that although the President has no expressly-stated absolute immunity under the Constitution as do members of Congress, *id.* at 750 n.31, his absolute immunity could be inferred due to "history" and "constitutional tradition" and the President's "unique position in the constitutional scheme," *id.* at 749. This Court held that the basis of this inferred, absolute immunity is the separation of powers. *Id.* This Court further held that the immunity protects

the President from suit for any action he takes within his "sphere of responsibility." *Id.* at 760-61 (Burger, C.J., concurring); see also *id.* at 749. The President's constitutional sphere of responsibility includes being Commander in Chief of the Armed Forces. See *id.* at 757; see also U.S. CONST. art. II, § 2. That responsibility, this Court held, "must include the authority to prescribe reorganizations and [terminations]." 457 U.S. at 757. This Court concluded, therefore, that a court could not second guess the President's decision to fire staff who fulfilled duties within the President's sphere of responsibility, *id.*, even when those staff were as far removed from the President's immediate sphere as was the management analyst working at the Pentagon. As Chief Justice Burger stated:

> [T]he Judiciary always must be hesitant to probe into the elements of Presidential decisionmaking . . . . Such judicial intervention is not to be tolerated absent imperative constitutional necessity . . . . [J]udicial intrusion through private damages actions improperly impinges on and hence interferes with the independence that is imperative to the functioning of the office of a President.
>
> . . . Absent absolute immunity . . . each suit . . . would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information. Such scrutiny of day-to-day decisions of the Executive Branch would be bound to occur . . . . [T]he need to prevent large-scale invasion of the Executive function by the Judiciary far outweighs the need to vindicate the private claims.

Id. at 761-62 (Burger, C.J., concurring). As discussed below, the decision of the court below is inconsistent with Speech or Debate Clause jurisprudence.

The court of appeals below rejected the panel's decision in *Browning*, 789 F.2d 923. *Browning* had held that personnel actions taken against a congressional employee whose job duties are "directly related to the due functioning of the legislative process" are barred by the Speech or Debate Clause because such personnel actions are within the legislative sphere. *Id.* at 929 (emphasis omitted). The court below rejected *Browning* on the ground that it was "overinclusive," App 17a. (Randolph, J.), or "overbroad," App. 28a (Rogers, J.); see also App. 45a (Brown, J.). Circuit Judge Randolph concluded that the *Browning* test was too broad because, "[a]t best, that an employee's duties are directly related to the legislative process establishes merely 'some nexus' between the personnel decision and that process."[8] App. 17a. In *Brewster*, 408 U.S. 501, this Court held that the Speech or Debate Clause does not protect acts that are merely "'related' to the office of a Member," *id.* at 513-14, or "'relate[d]' to the legislative process," *id.* at 516, but the Clause does protect all acts that are "part of . . . the *due* functioning of the [legislative] process." *Id.* To the extent that the *Browning* term "directly related to the due functioning of the legislative process" is broader than "part of the due functioning of the legislative process," the *Browning* test is too broad. But despite that language difference, Judge Randolph's conclusion is flawed. His analysis focuses on

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[8] Similarly, in rejecting the *Browning* test as too broad, Judge Brown found an employee's duties "an imperfect metric" for determining whether an employee's lawsuit will involve the court in matters within the legislative sphere. App. 45a. Judge Rogers found the *Browning* test overbroad "[f]or reasons stated in the opinions by Judge Randolph and Judge Brown." App. 28a.

whether the personnel action is part of the legislative "process." See, *e.g.*, App. 18a (Speech or Debate Clause protects conduct that is integral to the Member's legislative process), App. 17a ("establishes merely 'some nexus' between the personnel decision and that process"). A personnel action, however, is protected by the Speech or Debate Clause if it is part of the *due functioning* of the legislative process. The "functioning" of the process means the modus operandi of the process. In determining how his legislative process will function, a Member must decide matters such as which legislative duties he will perform himself, which legislative duties he will delegate to his employees, and how he wants those duties performed. That decision making is part of the functioning of his legislative process. When the Member takes personnel actions with respect to employees whose job duties are part of the due functioning of the legislative process, for example hires, fires, demotes, or assigns duties, the personnel actions are part of the due functioning of the legislative process: they are actions the Member takes to make the legislative process function. Such personnel actions are, therefore, protected by the Speech or Debate Clause. Moreover, contrary to Judge Randolph's conclusion, the Member's reason for the termination is irrelevant. Even when such an employee is terminated for tardiness, the termination is part of the due functioning of the legislative process: the Member has determined that his legislative process will function with fewer people or with someone other than that employee. Similarly, when an employee whose duties are part of the due functioning of the legislative process is demoted or rejected for a position, those personnel actions are part of the due functioning of the legislative process because the Member's decision about who he needs, and in what job positions he needs them, to make his legislative process function is itself part of the functioning of

his legislative process.[9] This is not to say, however, that *all* actions taken with respect to such an employee are part of the due functioning of the legislative process. For example, suppose that a Member's legislative director creates a hostile work environment, and a legislative assistant files a CAA action alleging sexual harassment. Creating a hostile work environment, unlike hiring, firing, demoting, and assigning duties, is objectively "beyond the apparent needs of the 'due functioning of the [legislative] process,'" *McMillan*, 412 U.S. at 317 (quoting *Brewster*, 408 U.S. at 516) (alteration in original), and therefore is not covered by Speech or Debate Clause immunity.

Judge Randolph also found this Court's *Fitzgerald* decision, 457 U.S. 731, inapposite to this case because the "President's immunity is based on his 'unique position in the constitutional scheme' and the 'singular importance of the President's duties.'" App. 19a (internal citations omitted). While this Court in *Fitzgerald* cited the President's "unique position in the constitutional scheme," 457 U.S. at 749, and the "singular importance of the President's duties," *id.* at 751, to justify the Court's inference that the President was entitled to an absolute immunity for his official acts, this Court did so because the President has no textual, absolute immunity. It does not follow that those who do not hold such a "unique" position are not protected by an absolute immunity. Members

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[9] Even limiting the Speech or Debate Clause's jurisdictional bar to challenges of personnel actions taken because of an employee's non-performance of duties within the legislative sphere would violate the Speech or Debate Clause. If the personnel action was taken due to the employee's non-performance of acts within the legislative sphere, then conditioning dismissal of the case on the defendant's submission of evidence of the reason for the personnel action would constitute questioning the motivation of a legislative act, thus violating the Speech or Debate Clause. See *Brewster*, 408 U.S. at 525.

of Congress are entitled to absolute immunity because the Constitution expressly grants it to them; inferring an immunity for them is unnecessary.

The Speech or Debate Clause absolute immunity, like the President's inferred absolute immunity, is grounded in separation of powers principles. Compare *Fitzgerald*, 457 U.S. at 749 (the President's absolute immunity is "rooted in the constitutional tradition of the separations of powers"), with *United States v. Gillock*, 445 U.S. 360, 370 (1980) (the Speech or Debate Clause "rest[s] solely on the separation of powers doctrine"). Thus, the purpose of the President's inferred absolute immunity and the Members' textual immunity is the same – to allow independent functioning of coequal branches of government within their respective, constitutionally-delegated sphere of responsibilities. *Compare Helstoski*, 442 U.S. at 491 (purpose of Speech or Debate Clause is to prevent "intrusion by the . . . Judiciary into the sphere of protected legislative activities"), with *Fitzgerald*, 457 U.S. at 761 (purpose of President's inferred immunity is to prevent "judicial intervention" into the President's "sphere of responsibility") (Burger, C.J., concurring). Congress's "sphere of responsibility" is all federal legislative powers. See U.S. CONST. art. I, § 1. Just as this Court concluded that the President's constitutional mandate of commanding the Armed Forces necessarily includes the authority to manage, without judicial interference, a management analyst who fulfilled duties within the President's sphere of responsibilities, so too a Member's constitutional mandate of handling all legislative matters necessarily includes the authority to manage, without judicial interference, employees who fulfill duties that are within the legislative sphere. Indeed, in *Fitzgerald* this Court recognized that it was extending to the President protections similar to those the Speech or Debate Clause affords Members:

> Although the individual who claims wrongful conduct may indeed have sustained some injury, the need to prevent large-scale invasion of the Executive function by the Judiciary far outweighs the need to vindicate the private claims. We have decided that in a similar sense Members of both Houses of Congress – and their aides – must be totally free from judicial scrutiny for legislative acts.

Fitzgerald, 457 U.S. at 762 (Burger, C.J., concurring).

An additional reason Circuit Judge Brown rejected the *Browning* test as overbroad is that it defined "very broadly the type of duties that might constitute 'an integral part of the legislative process'—even including within that definition a House reporter who lacked discretionary authority." App. 44a-45a. In determining whether an employee's duties are within the legislative sphere, this Court examines whether the duties are part of the due functioning of the legislative process, not whether the employee exercises discretionary authority. See *McMillan*, 412 U.S. at 317, 324 (Public Printer and Superintendent of Documents protected by Speech or Debate Clause immunity to the extent their distribution of reports was part of the due functioning of the legislative process).

Moreover, to the extent the court below relied on *Forrester v. White*, 484 U.S. 219 (1988) (see App. 9a-10a), in rejecting the *Browning* framework, its reliance was misplaced for several reasons. First, *Forrester* addressed common law immunity applicable to a state judge, which is not comparable or analogous to Speech or Debate Clause immunity. "[J]udicial immunity affords less protection than legislative immunity under the Speech or Debate Clause." *Eades v. Sterlinske*, 810 F.2d 723, 725 n.1 (7th Cir. 1987) (citing *Dennis v. Sparks*,

449 U.S. 24, 30 (1980)). "This Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U.S. Const., Art. I, § 6, cl. 1." *Forrester*, 484 U.S. at 224. Second, while Speech or Debate Clause immunity protects the separation of powers among independent, coequal branches of the federal government, see *Gillock*, 445 U.S. at 369-70, the separation of powers principle is inapplicable to the federal judiciary's relationship to the states because the federal judiciary and the states are not independent, coequal branches of government. See *id.* at 370. Third, this Court has stated that the *Forrester* "functional" test does not apply where Speech or Debate Clause immunity is involved: "Running through our cases, with fair consistency, is a 'functional' approach to immunity questions *other than those that have been decided by express constitutional or statutory enactment.*" *Forrester*, 484 U.S. at 224 (emphasis added). Fourth, while this Court found in *Forrester* that a state judge's administrative acts are not covered by common law judicial immunity, in *McMillan* this Court held that Speech or Debate Clause immunity covers administrative acts, printing and mailing documents within and outside Congress to such places as law firm libraries, that are within the legislative sphere. *McMillan*, 412 U.S. at 318, 324.[10]

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[10] Because the record before this Court in *McMillan* provided "little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity, ha[d] been exceeded," this Court remanded the case for a determination of whether the functionaries' administrative acts were within the legitimate legislative sphere. *McMillan*, 412 U.S. at 324-25. On remand, the district court found that the functionaries' acts were within the legitimate legislative sphere and dismissed the complaint as to them based on Speech or Debate Clause immunity. The Court of Appeals for the D.C. Circuit affirmed. *Doe v. McMillan*, 566 F.2d 713, 715, 718 (D.C. Cir. 1977).

In summary, the court below erred in finding that the Speech or Debate Clause is not a jurisdictional bar to CAA employment suits filed by an employee whose job duties are part of the due functioning of the legislative process. Personnel actions taken with respect to such an employee are part of the due functioning of the legislative process unless they are objectively beyond the apparent needs of the due functioning of the legislative process. Accordingly, the Speech or Debate Clause is an absolute bar to judicial interference with those personnel actions.

B. The Disparate Opinions Of The Circuit Judges As To Why The Speech Or Debate Clause Is Not A Jurisdictional Bar To Hanson's Suit Are Inconsistent With This Court's Speech Or Debate Clause Jurisprudence

Having rejected the framework it had previously established in *Browning*, the D.C. Circuit considered whether the Speech or Debate Clause nevertheless bars jurisdiction of Hanson's suit on some other basis. While the court concluded that the Clause is not a jurisdictional bar to Hanson's suit, the judges differed in their reasoning. Circuit Judge Randolph, joined by Chief Judge Ginsburg and Circuit Judges Henderson and Tatel, concluded that the Speech or Debate Clause does not present a jurisdictional bar to Hanson's suit because "it does not appear from . . . Hanson's complaint[] that [he] sought to predicate liability on protected conduct," *i.e.*, on acts within the legislative sphere. App. 20a. That is the sole basis on which Judge Randolph determined that the Clause does not bar jurisdiction of Hanson's suit. In her opinion concurring in part and in the judgment, Circuit Judge Rogers similarly found that the Speech or Debate Clause does not bar Hanson's suit because "an examination of the complaint[] makes clear that

[Hanson does not need to] rely on legislative acts to make a *prima facie* case," App. 28a.[11] Their rationale is flawed.

A court may consider materials outside the pleadings to satisfy itself that it has subject matter jurisdiction of a case. See *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 184 (1936). In most civil cases, the pleadings need not even set forth a prima facie case. See *Swierkiewicz v. Sorema*, 534 U.S. 506, 515 (2002). For example, in a discrimination case, the D.C. Circuit explained that "'[b]ecause racial discrimination in employment is 'a claim upon which relief can be granted,'... 'I was turned down for a job because of my race' is all a complaint has to say' to survive a motion to dismiss under Rule 12(b)(6)." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1115 (D.C. Cir. 2000) (quoting *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998)). In determining whether a claim is jurisdictionally barred, examining the complaint alone is much too restrictive. Indeed, finding such an examination to be conclusive would eviscerate the protections of the Speech or Debate Clause. See *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader . . . ."). Therefore, where the defendant moves pursuant to FED. R. CIV. P. 12(b)(1) to dismiss for lack of jurisdiction and supports its motion with a declaration or other relevant material, as the Dayton Office did, the court should consider all material

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[11] Judge Rogers appears to take the position that the Speech or Debate Clause also does not bar Hanson's suit because personnel actions are never "legislative acts." App. 28a. In this regard, she references this Court's decision in *Forrester*, 484 U.S. 219. As explained *supra* pp. 15-17, 19-20, Judge Rogers's conclusion is incorrect, and *Forrester* is inapposite to a determination as to the scope of Speech or Debate Clause immunity.

submitted, not just the complaint, in determining whether it has jurisdiction.

Moreover, Judge Randolph interprets the Speech or Debate Clause too narrowly. While his application of the Clause takes into account that a plaintiff cannot question acts within the legislative sphere or the motivation for those acts, it does not take into account that a Member cannot be made to answer – in terms of defending himself – for legislative acts or his motivation for actions within the legislative sphere. See *Gravel*, 408 U.S. at 616 ("We have no doubt that Senator Gravel may not be made to answer – either in terms of questions *or in terms of defending himself* from prosecution – for the events that occurred at the subcommittee hearing") (emphasis added). Cf. *Passman*, 442 U.S. at 235 n.11 ("Defenses based upon the Clause should thus ordinarily be given priority, since federal legislators should be exempted from litigation if their conduct is in fact protected by the Clause."); *Fitzgerald*, 457 U.S. at 762 ("Absent absolute immunity, . . . each suit . . . would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information.").[12]

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[12] Judge Randolph recognizes that if the defendant asserts that it took the challenged personnel action based on the plaintiff's performance of acts within the legislative sphere, then the plaintiff cannot seek to prevail by "draw[ing] in question the legislative activities and the motivation for those activities" asserted by the defendant. App. 25a (internal quotation marks omitted); see also App. 24a-27a. He ignores the fact, however, that requiring the production of evidence concerning legislative acts or the motivation for those acts either in defendant's response to the employee's prima facie case or in an affidavit invoking Speech or Debate Clause immunity, see App. 23a-26a, would itself violate the Clause.

Circuit Judge Brown, with whom Circuit Judges Sentelle and Griffith join, concurring in the judgment, finds that the Speech or Debate Clause's jurisdictional bar is not applicable to Hanson's suit or any other CAA action because the defendant in such suits is not the Member or the Member's alter ego, but rather an "employing office."[13] App. 45a-53a. That position is inconsistent with Speech or Debate Clause jurisprudence. This Court has not held that an act within the legislative sphere can form the predicate for a suit as long as a Member or his alter ego is the named defendant. Rather, such an act cannot form the predicate for a suit – period. See *McMillan*, 412 U.S. at 324 (Public Printer and Superintendent of Documents protected by Speech or Debate Clause immunity to the extent their actions are within the legislative sphere); see also *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (legislative committees can invoke legislative privilege). Regardless of who the defendant is, allowing Hanson's suit to proceed would violate the Speech or Debate Clause by allowing intrusion of the judiciary into the legislative sphere, including referencing past legislative acts, judging a Member's motives as to acts within the legislative sphere, and imperiling

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[13] Judge Brown found that the Speech or Debate Clause has only an evidentiary application in CAA cases. Even in that regard, however, her view is too restrictive. According to Judge Brown, the Clause functions as a testimonial and documentary privilege that only Members and qualified aides can assert when they are called to produce evidence regarding legislative acts, but the Clause plays no role to the extent others are questioned about legislative acts. App. 56a. That conclusion is contrary to this Court's holding in *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951), that legislative committees can invoke legislative privilege. See also *McMillan*, 412 U.S. at 324-25 (Public Printer and Superintendent of Documents protected by Speech or Debate Clause immunity to the extent their acts are within the legitimate legislative sphere).

legislative independence. See, *e.g.*, *Brewster*, 408 U.S. at 512; *Eastland*, 421 U.S. at 502-503; *Helstoski*, 442 U.S. at 490.[14]

In conclusion, the finding by some of the judges below that the Speech or Debate Clause never bars jurisdiction of CAA actions is inconsistent with Speech or Debate Clause precedent. Moreover, the framework used by the other judges below in determining whether the Speech or Debate Clause bars jurisdiction of a CAA suit is too restrictive because it does not consider material outside the complaint or a Member's defenses to the challenged action.

II. WHILE RECOGNIZING THAT THIS IS AN "IMPORTANT CASE" RAISING "PERPLEXING QUESTIONS," THE EN BANC COURT WAS UNABLE TO REACH A MAJORITY OPINION ON THE APPLICATION OF THE SPEECH OR DEBATE CLAUSE TO EMPLOYMENT CASES FILED BY CONGRESSIONAL EMPLOYEES; THIS COURT SHOULD RESOLVE THAT IMPORTANT ISSUE

In 1979 this Court last decided a case in which application of the Speech or Debate Clause was at issue. See *Helstoski*, 442 U.S. 477 (1979), and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (decided on the same day). Neither of those cases, however, involved application of the Speech or Debate Clause in an employment suit.

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[14] Judge Brown intimates that if the named defendant were a Member, the Speech or Debate Clause should jurisdictionally bar not only CAA actions "in which the complaints are predicated on legislative acts, but also suits that will inevitably necessitate an inquiry into such acts and motivations, even where such inquiry would arise due to an affirmative defense." App. 53a n.3.

As the decision of the D.C. Circuit below and the Tenth Circuit's decision in *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004), cert. denied, 126 S. Ct. 396 (2005), show, judges and courts disagree on the scope and application of the Speech or Debate Clause in CAA employment suits. See, *e.g.*, App. 23 n.23 ("Judge Brown's concurrence states that 'there is little reason to believe that allowing these suits to proceed will threaten legislative independence or unduly involve the judicial branch in the affairs of the legislative branch.' This speculation has no basis in reality. The Accountability Act authorizes suits based on conduct occurring in a Member's personal office, see 2 U.S.C. § 1408(b), which necessarily calls into question the actions of Members or their aides.") (opinion for the court in part filed by Randolph, J., with whom Ginsburg, C.J., and Henderson and Tatel, JJ., join) (internal citation omitted); App. 28a-29a (the "role [of the Speech or Debate Clause] presents potentially difficult questions, particularly as the Supreme Court has yet to speak to the question in this context, and its statements in other contexts can be understood to point in different directions, as the opinions of Judge Randolph and Judge Brown reflect.") (Rogers, J., concurring in part and in the judgment). Compare *Bastien*, 390 F.3d at 1315, 1316 (court unduly restricted the protections of the Speech or Debate Clause to matters "confined within the limits of formal, official proceedings" of Congress and found that Speech or Debate Clause immunity does not extend to "informal information gathering by individual members of Congress") with *McSurely v. McClellan*, 553 F.2d 1277, 1286, 1287 (D.C. Cir. 1976) (en banc) ("We have no doubt that information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation" and hence "'within the ambit of the [Speech or Debate Clause] privilege.'") (internal citation omitted). Given the importance of the Speech or Debate Clause in our constitutional scheme

and the need to prevent large scale intrusion of the legislative function by the judiciary, this Court should provide the lower courts with guidance as to the scope of the Clause and how it applies in employment suits by congressional employees whose job duties are part of the due functioning of the legislative process.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

JEAN M. MANNING
Senate Chief Counsel for Employment
Counsel of Record

TOBY R. HYMAN
Senate Senior Counsel for Employment

OFFICE OF SENATE CHIEF
COUNSEL FOR EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
(202) 224-5424

NOVEMBER 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 30, 2005 Decided August 18, 2006

No. 04-5315

BEVERLY A. FIELDS,
APPELLEE

v.

OFFICE OF EDDIE BERNICE JOHNSON,
EMPLOYING OFFICE, UNITED STATES CONGRESS,
APPELLANT

No. 04-5335

BRAD HANSON,
APPELLEE

v.

OFFICE OF SENATOR MARK DAYTON,
APPELLANT

Appeals from the United States District Court
for the District of Columbia
(No. 04cv00717)
(No. 03cv01149)

William F. Allen, Attorney, Office of House Employment Counsel, argued the cause of appellant in No. 04-5315. With him on the briefs was *Kimberly Carey Williams*, Attorney. *Gloria L. Ferguson*, Attorney, entered an appearance.

Geraldine R. Gennet, General Counsel, U.S. House of Representatives, and *Kerry W. Kircher*, Deputy General Counsel, were on the brief for *amicus curiae* Bipartisan Legal Advisory Group of the United States House of Representatives in No. 04-5315.

Henry J. Hyde, pro se, was on the brief for *amicus curiae* Congressman Henry J. Hyde in support of appellant in No. 04-5315.

Wayne Marcus Scriven argued the cause and filed the brief for appellee in No. 04-5315.

Jean M. Manning, Chief Counsel, Office of Senate Chief Counsel for Employment, argued the cause for appellant in No. 04-5335. With her on the briefs was *Toby R. Hyman*, Senior Counsel. *Mary S. Bach*, Counsel, entered an appearance.

Richard A. Salzman argued the cause for appellee in No. 04-5335. With him on the brief were *Douglas B. Huron* and *Tammy M. Kramer*.

Before: GINSBURG, *Chief Judge*, and SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, BROWN, and GRIFFITH, *Circuit Judges*.*

Opinion for the Court in part filed by *Circuit Judge* RANDOLPH, an opinion in which *Chief Judge* GINSBURG and *Circuit Judges* HENDERSON and TATEL join.

Opinion concurring in part and in the judgment filed by *Circuit Judge* ROGERS.

Concurring opinion filed by *Circuit Judge* TATEL.

Opinion concurring in the judgment filed by *Circuit Judge* BROWN, with whom *Circuit Judges* SENTELLE and GRIFFITH join.

RANDOLPH, *Circuit Judge*: Article I, section 6 of the Constitution provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." We ordered these two appeals to be argued together en banc in order to determine whether the Speech or Debate Clause requires dismissal of these suits brought under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438, and whether *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), should remain the law of this circuit.

I.

No. 04-5315 is an appeal from a district court order denying a motion to dismiss a complaint alleging that the

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* Circuit Judges Garland and Kavanaugh did not participate in this matter.

Office of Representative Eddie Bernice Johnson discriminated against Beverly A. Fields because of her race and gender and retaliated against her for objecting to discriminatory conduct. No. 04-5335 is an appeal from a district court order denying a motion to dismiss a complaint alleging that the Office of Senator Mark Dayton discriminated against Brad Hanson because of a perceived disability and violated the Fair Labor Standards Act. The Office of Representative Johnson and the Office of Senator Dayton (collectively, the "Member Offices") claim that the Speech or Debate Clause immunizes them from these suits and that the district court should have dismissed the complaints for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1).[1]

A.

Fields and Hanson each sued under the Accountability Act. The Act confers on "covered employees" rights and remedies drawn from various labor and employment statutes not previously applicable to the legislative branch.[2] 2 U.S.C. § 1302(a); *see id.* §§ 1311-16, 1331, 1341, 1351. It also

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[1] Although we do not ordinarily have jurisdiction to review an order denying a motion to dismiss because such an order is not "final" under 28 U.S.C. § 1291, *Bombardier Corp. v. Nat'l R.R. Passenger Corp.*, 333 F.3d 250, 253 (D.C. Cir. 2003), "[i]ssues of Speech or Debate Clause immunity may be immediately appealed," *Browning*, 789 F.2d at 926 n.6 (citing *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979)).

[2] Of particular relevance here, the Accountability Act incorporates portions of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of Titles 2, 5, and 29 of the U.S. Code), and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796*l*. *See* 2 U.S.C. § 1302(a).

includes an anti-retaliation provision that prohibits "an employing office" from "intimidat[ing], tak[ing] reprisal against, or otherwise discriminat[ing] against, any covered employee because the covered employee has opposed" or reported "any practice made unlawful" by the Accountability Act. *Id.* § 1317(a). A "covered employee" is an individual employed by the House of Representatives, the Senate, or some other office specifically enumerated in the statute. *Id.* § 1301(3).[3]

Section 1404(2) creates a cause of action for covered employees to sue in federal court for violations of the Accountability Act. Section 1408(a) vests the "district courts of the United States" with "jurisdiction over any civil action commenced under section 1404." Before initiating such an action, the employee must seek counseling by, and mediation with, the Office of Compliance, *id.* § 1408(a); *see* §§ 1402-1403, "an independent office within the legislative branch," *id.* § 1381(a). Thereafter, the employee may bring an action against "the employing office alleged to have committed the violation, or in which the violation is alleged to have occurred." *Id.* § 1408(b). An "employing office" for these purposes includes "the personal office of a Member of the House of Representatives or of a Senator." *Id.* § 1301(9)(A).

Fields, an African American female and the plaintiff in No. 04-5315, served as Representative Johnson's chief of staff from January 2002 until her discharge in early 2004. The parties agree that as chief of staff, Fields was deeply involved in a wide array of Representative Johnson's legislative work. Fields's complaint alleged as follows. Elisabeth Howie, a "Black Latino," worked as an executive assistant and scheduler

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[3] The statute also protects former employees and applicants for employment. 2 U.S.C. § 1301(4).

for the Office of Representative Johnson. In April 2003, the office decided to replace Howie with "an Asian person under the age of 40." Fields objected, but her objections were rebuffed, and she was directed to give Howie one day's notice that she was being terminated.

After Fields made her objections to Howie's termination known around the office, her co-workers began falsely accusing her of poor performance. Fields alleged they did so because they wanted "a Caucasian male rather than an African American female" to be Representative Johnson's chief of staff. Their efforts eventually succeeded when the Office of Representative Johnson promoted a non-African American male employee to chief of staff and demoted Fields to administrative assistant. The Office of Representative Johnson increased the new chief of staff's salary by approximately $10,000 – something it failed to do for Fields despite promising her a salary increase when she was chief of staff.

Fields filed an employment discrimination complaint with the Office of Compliance on December 18, 2003, and began the required counseling and mediation. While this was going on, the Office of Representative Johnson "initiated a bad faith and bogus investigation of plaintiff's conduct as an employee . . . to embarrass plaintiff before her co-workers and to force plaintiff to resign from her employment position." When Fields refused either to drop her discrimination claims or to resign, she was abruptly terminated. In response to this additional retaliation, Fields filed a second employment discrimination complaint with the Office of Compliance on March 11, 2004, and again complied with the counseling and mediation requirements.

After exhausting her administrative remedies, Fields sued the Office of Representative Johnson under the Accountability Act. She alleged racial and gender discrimination in violation

of 2 U.S.C. § 1311(a)(1) (incorporating § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2), equal pay discrimination in violation of 2 U.S.C. § 1313(a)(1) (incorporating §§ 6(a)(1) and (d), 7, and 12(c) of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206(a)(1), (d), 207, 212(c)), and two counts of retaliation in violation of 2 U.S.C. § 1317(a). The Office of Representative Johnson moved to dismiss the complaint for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1), asserting immunity from suit under the Speech or Debate Clause. The district court denied the motion to dismiss without explanation. After ordering an en banc review, we granted Representative Johnson's motion to intervene for the limited purpose of asserting her Speech or Debate Clause immunity.

Brad Hanson, the plaintiff in No. 04-5335, joined Senator Dayton's Senate campaign in July 2000 and began serving as State Office Manager in Senator Dayton's Ft. Snelling, Minnesota, office upon the Senator's election to office. Hanson's complaint alleged as follows. Hanson's work for Senator Dayton centered on "setting up the Senator's three local offices in Minnesota" and overseeing "the transition of the Health Care Help Line to Senator Dayton's personal Senate office."[4] The Health Care Help Line "offered assistance to people having difficulties with their health insurance carriers, HMO's or physicians." This work often required Hanson, an employee entitled to overtime pay under the Fair Labor Standards Act, to work overtime. The Office of Senator Dayton never paid him for this overtime, even though the

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[4] The parties agree that Hanson spent much of his time working on the Health Care Help Line, but they disagree about whether this and other assistance Hanson provided to Senator Dayton constituted legislative activities or merely "constituent services."

Office "recognized" his "effectiveness" by increasing his salary and paying him a bonus in January 2002.

Hanson began experiencing cardiac arrhythmia early in 2002. His physician advised him to undergo a coronary ablation. The surgery would require only a short hospital stay, but Hanson would need two to three weeks away from work to recover. Hanson informed his co-workers that he needed heart surgery and arranged a short meeting with Senator Dayton on July 3, 2002, in the Ft. Snelling office to share the news with him. "The meeting had not gone on for more than five minutes when the Senator abruptly told Hanson, 'You're done,'" without explanation. Senator Dayton told Hanson to stop reporting to the office and to take medical leave instead. Matt McGowan, Senator Dayton's Washington Office Manager, later called Hanson at home to inform him that "he would be terminated as of September 30." Hanson then underwent coronary ablation and fully recovered.

Hanson sued the Office of Senator Dayton under the Accountability Act after exhausting his administrative remedies. His complaint accused the Office of Senator Dayton of violating 2 U.S.C. § 1312(a) (incorporating §§ 101-105 of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2611-2615), discriminating against him on the basis of a perceived disability in violation of 2 U.S.C. § 1311(a)(3) (incorporating § 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791, and §§ 102-104 of the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12112-12114), and failing to pay him overtime compensation in violation of 2 U.S.C. § 1313 (incorporating the aforementioned provisions of the Fair Labor Standards Act). The Office of Senator Dayton asserted immunity from suit under the Speech or Debate Clause and moved to dismiss the complaint for lack of

subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1).[5] The district court denied the motion without explanation.

B.

Relying on *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), the Member Offices argue that the district court lacked jurisdiction and should have dismissed these suits because the Speech or Debate Clause immunizes them from suits challenging personnel decisions concerning employees like Fields and Hanson who assist Members in performing legislative functions.

In *Browning*, a former employee of the House of Representatives sued the Speaker and other House officers for employment discrimination. *Id.* at 924 & n.2. Browning was "the first black Official Reporter employed by the United States House of Representatives." *Id.* at 924. She claimed that despite some poor performance on the job, "the true reason behind her dismissal was racial animus." *Id.* We held that a Member's personnel decision is shielded from judicial scrutiny when "the [affected] employee's duties were directly related to the due functioning of the legislative process." *Id.* at 929 (emphasis removed).

Later decisions cast doubt on *Browning*. Two years after *Browning*, the Supreme Court ruled that a state-court judge did not have "absolute immunity from a suit for damages under 42 U.S.C. § 1983 for his decision to dismiss a subordinate court employee." *Forrester v. White*, 484 U.S. 219, 220 (1988). The Court described its "absolute official immunity" jurisprudence as "quite sparing," citing as examples legislative immunity

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[5] The Office of Senator Dayton later filed an answer denying Hanson's allegations.

under the Speech or Debate Clause and Presidential immunity under *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). *Forrester*, 484 U.S. at 224-25.[6] Consistent with the narrowness of absolute immunity in these contexts, the Court explained that judges are entitled to absolute immunity only for "judicial acts," not "administrative, legislative, or executive functions," *id.* at 227, no matter how "essential" such functions may be "to the very functioning of the courts," *id.* at 228. The Court then concluded that the employment decision in *Forrester* was an administrative, not a judicial, act and that the state-court judge therefore was not entitled to absolute immunity. *Id.* at 229-30.

Gross v. Winter, 876 F.2d 165 (D.C. Cir. 1989), presented the question whether common law legislative immunity exempted a D.C. Councilmember's personnel decisions from judicial review. We recognized that *Browning*'s focus on "the duties of the employee" as the "ultimate issue" was "unquestionably [in] tension" with *Forrester*, "which accords no weight to the duties of the employee." *Winter*, 876 F.2d at 170 (quoting *Browning*, 789 F.2d at 928) (internal quotation mark omitted; emphasis removed). We found "*Forrester*, not *Browning*, controlling" and concluded that "the functions judges and legislators exercise in making personnel decisions affecting [probation offices and legislative aides, respectively] are administrative, not judicial or legislative." *Id.* at 172.

Now a conflict in the circuits has developed. In *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301

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[6] The Court characterized its decisions interpreting the Speech or Debate Clause as being "careful not to extend the scope of the [Clause's] protection further than its purposes require." 484 U.S. at 224. The Court described the President's absolute immunity as resting on the President's "'unique position in the constitutional scheme.'" *Id.* at 225 (quoting *Fitzgerald*, 457 U.S. at 749).

(10th Cir. 2004), *cert. denied*, 126 S. Ct. 396 (2005), a case brought under the Accountability Act, the Tenth Circuit held that the Speech or Debate Clause bars judicial review of a Senator's allegedly discriminatory personnel decision only when the plaintiff's claim "question[s] the conduct of *official* Senate legislative business." *Id.* at 1304 (emphasis added). The court was "hesita[nt] to embrace th[e] test" we employed in *Browning*, which it considered inconsistent with the Supreme Court's Speech or Debate Clause jurisprudence. *Id.* at 1318-19.

II.

The Accountability Act allows an employee of the House or Senate to recover damages and seek injunctive relief from a Member's personal office "alleged to have committed [a] violation [of the Accountability Act], or in which the violation is alleged to have occurred." 2 U.S.C. § 1408(b); *id.* § 1301(3), (9); *see, e.g., id.* §§ 1311(b)(1), 1312(b), 1313(b).[7] Congress thereby unequivocally waived the sovereign immunity of a Member's personal office facing such allegations. *See Lane v. Peña*, 518 U.S. 187, 192 (1996). Congress also provided in § 1413 that § 1408 "shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any Senator or Member of the House of Representatives under article I, section 6, clause 1, [the Speech or Debate Clause] of the Constitution." The Accountability Act therefore does

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[7] After midnight of the first day of the 104th Congress, the House passed the Act with little debate and without a committee hearing or a committee vote; the Senate passed its version a few days later, again with scarcely any debate and no hearings; there was no conference committee; and even the Senate bill's sponsor lamented the lack of consideration given to this legislation. *See* James T. O'Reilly, *Collision in the Congress: Congressional Accountability, Workplace Conflict, and the Separation of Powers*, 5 GEO. MASON L. REV. 1, 3-4 (1996).

nothing to a Member's Speech or Debate Clause immunity, and we must determine how that immunity operates in suits under the Accountability Act.

The Speech or Debate Clause reinforces the separation of powers and protects legislative independence. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975) (quoting *United States v. Brewster*, 408 U.S. 501, 507 (1972); *United States v. Johnson*, 383 U.S. 169, 178 (1966)); *Gravel v. United States*, 408 U.S. 606, 616 (1972); *Powell v. McCormack*, 395 U.S. 486, 503 (1969); *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951).[8] As to the judicial branch, the Clause can protect Members "from inquiry into legislative acts or the motivation for actual performance of legislative acts," *Brewster*, 408 U.S. at 508, "from the burden of defending" certain suits, *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam), and "from the consequences of litigation's results," *id.* *See United States v. Helstoski*, 442 U.S. 477, 487, 489 (1979), *Doe v. McMillan*, 412 U.S. 306, 318 (1973); *Powell*, 395 U.S. at 502-03, 505; *Johnson*, 383 U.S. at 173; *Tenney*, 341 U.S. at 377. In each case, the Clause must be applied "in such a way as to insure the independence of the legislature without altering

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[8] The Speech or Debate Clause was adopted by the Founders "without discussion and without opposition." *Johnson*, 383 U.S. at 177; *see* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 378, 406 (Jonathan Elliot ed., 2d ed. William S. Hein & Co. 1996) (1891); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 246 (Max Farrand ed., 1966). The historical antecedents of the Clause are discussed in Justice Frankfurter's opinion for the Court in *Tenney*, 341 U.S. at 372-75, and in Justice Harlan's opinion for the Court in *Johnson*, 383 U.S. at 177-83. *See also Powell*, 395 U.S. at 502-03; *Gravel*, 408 U.S. at 652-59 (Brennan, J., dissenting); 2 THE FOUNDERS' CONSTITUTION 318-45 (Philip B. Kurland & Ralph Lerner eds., 1987).

the historic balance of the three co-equal branches of Government." *Brewster*, 408 U.S. at 508.

The parties accept these principles and urge us to resolve broad questions related to suits under the Accountability Act: can a Member's personal office invoke the Speech or Debate Clause on the Member's behalf, as legislative aides and committees can?[9] is a personal decision *always* an administrative act,[10] or could a personnel decision be a legislative act in certain circumstances?[11] and so forth. "These are perplexing questions. Their difficulty admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case[s]." *Whitehouse v. Ill. Cent. R.R. Co.*, 349 U.S. 366, 372-73 (1955); *see Longshoremen v. Boyd*, 347 U.S. 222, 224 (1954). We therefore begin with the validity of our decision in *Browning*.

A.

The Speech or Debate Clause protects a Member's conduct if it is an integral "part of . . . the due functioning of the [legislative] process." *Brewster*, 408 U.S. at 516 (emphasis removed); *accord Gravel*, 408 U.S. at 625. The Clause obviously covers core legislative acts – "how [a Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee." *Brewster*, 408 U.S. at 526; *see also*

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[9] *See Gravel*, 408 U.S. at 616-18; *see also McMillan*, 412 U.S. at 312-13; *Tenney*, 341 U.S. 379.

[10] *Cf. Forrester v. White*, 484 U.S. 219, 228-29 (1988); *Gross v. Winter*, 876 F.2d 165, 170-72 (D.C. Cir. 1989).

[11] *Cf. Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Rateree v. Rockett*, 852 F.2d 946, 950-51 (7th Cir. 1988).

Bastien, 390 F.3d at 1314.[12] But the Supreme Court has long held that the Clause does more.[13] It protects acts that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. And the Clause provides further protection in precluding "inquiry . . . into the

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[12] *See, e.g., Gravel*, 408 U.S. at 625 ("The heart of the Clause is speech or debate in either House."); *Brewster*, 408 U.S. at 512 ("A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. . . . [T]he Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts."); *Kilbourn*, 103 U.S. at 204 (protecting "things generally done in a session of the House by one of its members in relation to the business before it"); *see also Coffin v. Coffin*, 4 Mass. (1 Tyng) 1, 31 (1808) ("[I]t must appear that some language or conduct of his, in the character of a representative, is the foundation of the prosecution, for in no other character can he claim the privilege.").

[13] Over the years, the Supreme Court has articulated a number of different formulations to describe what the Speech or Debate Clause protects. *See, e.g., Helstoski*, 442 U.S. at 489 ("The Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. It precludes any showing of how [a legislator] acted, voted, or decided." (alteration in original; citation and internal quotation marks omitted)); *U.S. Servicemen's Fund*, 421 U.S. at 501 ("The question to be resolved is whether the actions of the [Member] fall within the 'sphere of legitimate legislative activity.'" (footnote omitted)); *Johnson*, 383 U.S. at 180 ("[A] charge . . . that the Congressman's conduct was improperly motivated . . . is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry."); *Tenney*, 341 U.S. at 376 (inquiring "whether from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity"); *see also Coffin*, 4 Mass (1 Tyng) at 27 (protecting "every thing said or done by [a Member] in the exercise of the functions of that office").

motivation for" acts "that occur in the regular course of the legislative process." *Helstoski*, 442 U.S. at 489 (quoting *Brewster*, 408 U.S. at 525); *accord Johnson*, 383 U.S. at 180. In defining these categories of protected conduct, the Court has been careful not "to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process." *Brewster*, 408 U.S. at 516. The Speech or Debate Clause therefore "does not prohibit inquiry into illegal conduct simply because it has *some nexus* to legislative functions," *id.* at 528 (emphasis added), or because it is merely "related to," as opposed to "part of," the "due functioning" of the "legislative process," *id.* at 514 (emphasis removed).

Fields and Hanson contend that personnel decisions never can be "an integral part of the deliberative and communicative processes" in which Members engage as legislators, *Gravel*, 408 U.S. at 625, because personnel decisions never have more than merely "some nexus to legislative functions," *Brewster*, 408 U.S. at 528; *see id.* at 513-16. We agree that some personnel decisions would not qualify. The legislative process at the least includes "delivering an opinion, uttering a speech, or haranguing in debate";[14] proposing legislation;[15] voting on

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[14] *Tenney*, 341 U.S. at 374 (quoting *Coffin*, 4 Mass. (1 Tyng) at 27); *accord Brewster*, 408 U.S. at 526 (protecting "how [a Member] spoke, how he debated"); *see also Johnson*, 383 U.S. at 180 ("[T]he Speech or Debate Clause extends at least so far as to prevent [conspiring to give a speech in the House in exchange for remuneration] from being made the basis of a criminal charge against a member of Congress . . .."). This, of course, is obvious from the text of the Speech or Debate Clause. U.S. CONST. art I, § 6.

[15] *See Kilbourn*, 103 U.S. at 204 (protecting "resolutions offered"); *see also Brewster*, 408 U.S. at 526 (protecting "anything [a Member] did in the chamber or in committee"); *Tenney*, 341 U.S. at 374 (protecting "every

legislation;[16] making, publishing, presenting, and using legislative reports;[17] authorizing investigations and issuing subpoenas;[18] and holding hearings and "introducing material at Committee hearings."[19] Many personnel decisions by Members' personal offices lack even "some nexus," *Brewster*, 408 U.S. at 528, to these types of legislative acts. Firing an

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other act resulting from the nature, and in the execution, of the office") (quoting *Coffin*, 4 Mass. (1 Tyng) at 27).

[16] *See Brewster*, 408 U.S. at 526 (protecting "how [a Member] voted"); *Tenney*, 341 U.S. at 374 (protecting "the giving of a vote") (quoting *Coffin*, 4 Mass. (1 Tyng) at 27); *Kilbourn*, 103 U.S. at 204 (protecting "the act of voting, whether it is done vocally or by passing between the tellers").

[17] *See McMillan*, 412 U.S. at 312 ("[A] published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries."); *id.* at 313 (protecting "preparing a report where [the challenged materials] were reproduced, and authorizing the publication and distribution of that report"); *Tenney*, 341 U.S. at 374 (protecting "the making of a written report"); *Kilbourn*, 103 U.S. at 204 (protecting "written reports presented in [the legislative] body by its committees").

[18] *See U.S. Servicemen's Fund*, 421 U.S. at 504 ("The power to investigate and to do so through compulsory process plainly falls within [the definition of legislative activity]."); *id.* ("Issuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate."); *McMillan*, 412 U.S. at 313 (protecting the "act[] of authorizing an investigation pursuant to which the subject materials were gathered"); *Tenney*, 341 U.S. at 377 ("Investigations, whether by standing or special committees, are an established part of representative government.").

[19] *McMillan*, 412 U.S. at 312 ("[I]t is plain to us that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief . . . for introducing material at Committee hearings . . ., for referring the Report that included the material to the Speaker of the House, and for voting for publication of the report."); *id.* at 313 (protecting the act of "holding hearings where the [challenged] materials were presented").

aide for falsifying expense reports, or disciplining an assistant for harassing others in the office is "not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator." *Brewster*, 408 U.S. at 526.

Browning nevertheless held that the Speech or Debate Clause protects those personnel decisions taken with respect to employees whose duties are "directly related to the due functioning of the legislative process." *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, 929 (D.C. Cir. 1986) (emphasis removed). We now see that an employee's duties are too crude a proxy for protected activity. Our holding in *Browning* presumes that a personnel decision with regard to an employee whose duties are "directly related to the due functioning of the legislative process," *Browning*, 789 F.2d at 929 (emphasis removed), is always "an integral part of the deliberative and communicative processes," *Gravel*, 408 U.S. at 625. But the presumption is, at a minimum, overinclusive and therefore inconsistent with the Court's practice of being "careful not to extend the scope of the protection further than its purposes require." *Forrester v. White*, 484 U.S. 219, 224 (1988). Any number of counter-examples reveal as much: a legislative aide may be discharged because of budgetary cutbacks; a staff member may be demoted solely for consistent tardiness; a person seeking a top-level staff position might be rejected for having a poor college transcript; and so forth. That the person targeted by the personnel decision performs duties "directly related to . . . the legislative process," *Browning*, 789 F.2d at 929 (emphasis removed), is not enough – conduct must be "part of," not merely "related to," the "due functioning" of the "legislative process" to be protected by the Speech or Debate Clause, *Brewster*, 408 U.S. at 514. At best, that an employee's duties are directly related to the legislative process establishes merely "some nexus" between the personnel decision and that process. *Brewster*, 408 U.S. at 528; *see*

Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 415 (D.C. Cir. 1995). We therefore reject *Browning*'s test for determining when a legislator's personnel decision is protected by the Speech or Debate Clause.

The Office of Senator Dayton defends *Browning* on the ground that "[d]irecting one's alter egos" – that is, legislative aides with duties directly related to the legislative process, *see Gravel*, 408 U.S. at 616-17 – necessarily "is an integral part of the processes of achieving one's legislative goals," because of the duties such employees perform. Br. for Appellant Office of Senator Dayton 20. We see several problems with this formulation. The Speech or Debate Clause protects conduct that is integral to the legislative *process*, not a Member's legislative *goals*. It may be integral to a Member's legislative goals – indeed, integral even to accomplishing his "constitutionally delegated duties," *id.* – to send newsletters to constituents or deliver speeches outside of Congress to generate support for prospective legislation. But such acts are "political," not "legislative," and therefore not protected by the Speech or Debate Clause. *Brewster*, 408 U.S. at 512; *see Proxmire*, 443 U.S. at 131. Another problem with the formulation lies in its assumption that a Member only directs his alter egos with regard to constitutionally protected activities. "That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. at 625. Legislative aides are no different.[20]

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[20] We have recognized that a "Member's ability to do his job as a legislator effectively is tied . . . to the Member's relationship with the public and in particular his constituents and colleagues in the Congress." *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 665 (D.C. Cir. 2006). While there is no doubt a "clear nexus" between a personnel decision involving an employee with legislative duties and the Member's "ability to

The Office of Senator Dayton also relies on *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) – the presidential immunity case – to defend *Browning*. In *Fitzgerald*, the Supreme Court relied on separation of powers principles to grant the President "absolute . . . immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 756. It is true that both legislative and presidential immunity are animated by separation of powers principles. But this does not mean that the immunities are coextensive. The President's immunity is based on his "unique position in the constitutional scheme," *id.* at 749, and the "singular importance of the President's duties," *id.* at 751. The Court therefore approaches presidential immunity differently. *Id.* at 749; *see Forrester*, 484 U.S. at 224-25; *Bastien*, 390 F.3d at 1317. Legislative immunity under the Speech or Debate Clause is limited to matters that are part of, or integral to, the due functioning of the legislative process. It is not enough that a Member's conduct is within the outer perimeter of the legislative process. *Cf. Brewster*, 408 U.S. at 513-16, 528.[21]

B.

Without *Browning*, we are left with the question how the district court should evaluate the Member Offices' claims to Speech or Debate Clause immunity in these suits.

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carry out his representative responsibilities effectively," *id.* at 665-66, a "nexus" alone is insufficient to trigger the protections of the Speech or Debate Clause, *Brewster*, 408 U.S. at 528.

[21] There are other differences. Presidential immunity, for instance, "does not extend indiscriminately to the President's personal aides or to Cabinet level officers," *Forrester*, 484 U.S. at 225 (citations omitted), while Speech or Debate Clause immunity may be invoked by a Member's "aides insofar as the[ir] conduct . . . would be a protected legislative act if performed by the Member himself," *Gravel*, 408 U.S. at 618.

The Speech or Debate Clause operates as a jurisdictional bar when "the actions upon which [a plaintiff] sought to predicate liability were 'legislative acts.'" *McMillan*, 412 U.S. at 318 (quoting *Gravel*, 408 U.S. at 618). To determine on what actions a plaintiff sought to predicate liability, we examine the pleadings. *See id.* at 312 (finding it "plain . . . that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief" for conduct protected by the Clause); *Tenney*, 341 U.S. at 376 (inquiring "whether from the pleadings it appears that the [legislators] were acting in the sphere of legitimate legislative activity."); *see also Brewster*, 408 U.S. at 525 (examining the face of the indictment to determine whether "inquiry into legislative acts or motivation for legislative acts is necessary . . . to make out a prima facie case"). In these cases, it does not appear from Fields's or Hanson's complaints that either sought to predicate liability on protected conduct. Fields alleges that the Office of Representative Johnson discriminated against her because of her race and gender and retaliated against her when she objected to discriminatory treatment of her co-worker, Elisabeth Howie, and when she filed a complaint with the Office of Compliance. Hanson alleges that Senator Dayton himself discriminated against him because of his heart condition and that the Office of Senator Dayton denied him deserved overtime compensation. In neither case is it "necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation" of the Accountability Act. *Brewster*, 408 U.S. at 526; *compare Bastien*, 390 F.3d at 1315-16.[22]

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[22] Because the complaints are not predicated on legislative acts, Judge Brown's concurrence is mistaken in thinking it necessary to decide whether the defendant – that is, the personal office of the Member – is equivalent to the Member for the purpose of invoking the jurisdictional bar of the Speech

But the fact that Fields and Hanson are able to plead prima facie cases under the Accountability Act without violating the Speech or Debate Clause does not mean the Speech or Debate Clause in no way hinders their suits. When the Clause does not preclude suit altogether, it still "protect[s] Members from

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or Debate Clause. To prove the lack of equivalency in the abstract – which misapplies the law for the reasons Judge Tatel gives in his separate opinion – Judge Brown writes that "nothing in the Act suggests that the member can make final litigation decisions on behalf of the employing office." Op. of Judge Brown 15. This is not only irrelevant but impossible. Litigation decisions are made by the client, on the advice of counsel. The attorney representing the Member's office is not a free agent. His client is the personal office of the Member, which consists of the Member and his staff. Who is in charge of the office and who makes the decisions for the office? The Member of course.

Judge Brown argues that a Member's personal office cannot invoke the Clause on the Member's behalf because it "is not a person, nor a sovereign government, nor a branch of government, nor an agency created by statute, nor a chartered corporation, nor a trust, nor a partnership." Op. of Judge Brown 12. The same could be said of congressional committees, which fall within the Accountability Act's definition of "employing office." 2 U.S.C. § 1301(9). Yet the Supreme Court has held that legislative committees may invoke the Clause. *See Tenney*, 341 U.S. at 379. Precedent in this circuit is to the same effect. *See Consumers Union v. Periodical Correspondents Ass'n*, 515 F.2d 1341 (D.C. Cir. 1975). Judge Brown cannot square her position with *Tenney*, which the Supreme Court treats as a Speech or Debate Clause case, *Powell*, 395 U.S. at 501, or with *Consumers Union*.

Judge Brown also thinks it significant that "an employee in the personal office of a member is in truth an employee of *Congress*" because salary payments are administered centrally by the Secretary of the Senate and the Chief Administrative Officer of the House of Representatives. *See* Op. of Judge Brown 12-13. That is also true of legislative aides, who are able to invoke the Clause in certain circumstances, *see Gravel*, 408 U.S. at 621-22 – indeed it is true even of Members. These matters, as well as the exceedingly odd idea that a Member's staffing decisions are made "on behalf of Congress" rather than the Member, Op. of Judge Brown 12, simply have no bearing on the issues before us.

inquiry into legislative acts or the motivation for actual performance of legislative acts." *Brewster*, 408 U.S. at 508; *Brown & Williamson*, 62 F.3d at 415 n.5 ("Even when properly subject to suit, members of Congress are privileged against the evidentiary use against them of any legislative act, even if the act is not claimed to be itself illegal, but is offered only to show motive . . .." (citing *Helstoski*, 442 U.S. at 487-89); *Brewster*, 408 U.S. at 527; *Johnson*, 383 U.S. at 169)). This evidentiary privilege includes a "testimonial privilege." *Brown & Williamson*, 62 F.3d at 418. A Member "may not be made to answer" questions – in a deposition, on the witness stand, and so forth – regarding legislative activities. *Gravel*, 408 U.S. at 616; *see Brown & Williamson*, 62 F.3d at 418-21. "Revealing information as to a legislative act . . . to a jury" – whether by testimony or other evidence – "would subject a Member to being 'questioned' in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause." *Helstoski*, 442 U.S. at 490.

Thus, even if the challenged personnel decisions are not legislative acts, inquiry into the motivation for those decisions may require inquiry into legislative acts. For example, interactions with legislative staff (which may form part of the basis for personnel actions) are often part of the due functioning of the legislative process. The Supreme Court recognized this in *Gravel* when it approved an order that, among other things, "forbade questioning any witness including [a congressional aide] . . . concerning communications between the Senator and his aides during the term of their employment and related to [a particular] meeting or any other legislative act of the Senator." *Gravel*, 408 U.S. at 628-29 (footnote omitted).

The Speech or Debate Clause therefore may preclude some relevant evidence in suits under the Accountability Act."[23]

Most of the claims in these suits allege discrimination and, absent direct evidence of discrimination, are subject to the framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[24] That framework – under which a plaintiff proves a prima facie case of discrimination, which the employer rebuts by producing evidence that its conduct was nondiscriminatory, which the plaintiff then seeks to demonstrate is pretextual, *see Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981) – presents special

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[23] Judge Brown's concurrence states that "there is little reason to believe that allowing these suits to proceed will threaten legislative independence or unduly involve the judicial branch in the affairs of the legislative branch." Op. of Judge Brown 16. This speculation has no basis in reality. The Accountability Act authorizes suits based on conduct occurring in a Member's personal office, *see* 2 U.S.C. § 1408(b), which necessarily calls into question the actions of Members or their aides.

[24] Fields alleges racial and gender discrimination in violation of 2 U.S.C. § 1311, which incorporates § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, to which the *McDonnell Douglas* framework applies, *see McDonnell Douglas Corp.*, 411 U.S. at 802. She also alleges retaliation under 2 U.S.C. § 1317(a), to which the *McDonnell Douglas* framework presumably applies. *See Broderick v. Donaldson*, 437 F.3d 1226, 1231-32 (D.C. Cir. 2006). Hanson alleges disability discrimination in violation of 2 U.S.C. § 1311(a)(3), which incorporates § 501 of the Rehabilitation Act, 29 U.S.C. § 791, and §§ 10[illegible] of the Americans With Disabilities Act, 42 U.S.C. §§ 12112-12114, both of which are subject to the *McDonnell Douglas* framework. *See Barth v. Gelb*, 2 F.3d 1180, 1185-86 (D.C. Cir. 1993) (Rehabilitation Act); *Duncan v. Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1114 (D.C. Cir. 2001) (en banc) (Disabilities Act).

problems in the context of the Speech or Debate Clause.[25] Liability for discriminatory personnel decisions rests not on the fact that action was taken ("you can't *fire* me"), nor on the duties of the employee against whom action was taken ("you can't fire the chief of staff"), but on the reason that action was taken ("you can't fire me *for that reason*"). But what happens when the action was motivated by the employee's participation in the legislative process?

Suppose a plaintiff sues a Member's personal office claiming her discharge violated the Accountability Act. Suppose further that she is able to make out a prima facie case of discrimination of one form or another. If the employing office produces evidence – by affidavit, for example – that the personnel decision was made because of the plaintiff's poor performance of conduct that is an integral part of "the due functioning of the [legislative] process," *Brewster*, 408 U.S. at 516 (emphasis removed), then for the plaintiff to carry her burden of persuasion, she must "demonstrate that the proferred reason was not the true reason for the employment decision," *Burdine*, 450 U.S. at 256; *see also Smith v. District of*

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[25] Not all of the claims in the complaints allege discrimination. Fields and Hanson both allege violations of 2 U.S.C. § 1313, which incorporates certain provisions of the Fair Labor Standards Act, but to which the *McDonnell Douglas* framework does not apply. *See, e.g., Thompson v. Sawyer*, 678 F.2d 257, 270-71 (D.C. Cir. 1982) (discussing equal pay discrimination in violation of 29 U.S.C. § 206(d)); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) (discussing burden allocation in suits seeking overtime compensation under the Fair Labor Standards Act). (Hanson also alleges a nondescript violation of 2 U.S.C. § 1312, which incorporates §§ 101-105 of the Family and Medical Leave Act, 29 U.S.C. §§ 2611-2615, but the complaint does not give sufficient detail to know whether the *McDonnell Douglas* framework will apply to this claim.) Nondiscrimination claims such as these, which may give rise to liability regardless of the employer's motivation, are unlikely to present the problems discussed above.

Columbia, 430 F.3d 450, 455-56 (D.C. Cir. 2005); *Murray v. Gilmore*, 406 F.3d 708, 713 (D.C. Cir. 2005). In many cases, the plaintiff would be unable to do so without "draw[ing] in question" the legislative activities and the motivations for those activities asserted by the affiant – matters into which the Speech or Debate Clause prohibits judicial inquiry. *Brewster*, 408 U.S. at 526 (quoting *Johnson*, 383 U.S. at 185); *see also Helstoski*, 442 U.S. at 490. For example, if a Senator claimed to have fired an employee because speeches the employee wrote did not accurately reflect the Senator's legislative objectives, the Speech or Debate Clause would preclude the employee from proving her case by demonstrating that the speeches she wrote did in fact accurately reflect the Senator's legislative objectives. In such a case, if the evidence ultimately bore out the affiant's account of the plaintiff's discharge, then the very inquiry leading to that conclusion would be unconstitutional. *See Helstoski*, 442 U.S. at 489 ("The Clause protects 'against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.' . . . [R]eferences to past legislative acts of a Member cannot be admitted without undermining the values protected by the Clause." (quoting *Brewster*, 408 U.S. at 525)).

In employment discrimination cases under the Accountability Act, then, as in any other employment discrimination case, the defendant will provide evidence of a legitimate nondiscriminatory reason for the discharge. To invoke the Speech or Debate Clause, the employing office should include with this evidence an affidavit from an individual eligible to invoke the Speech or Debate Clause recounting facts sufficient to show that the challenged personnel decision was taken because of the plaintiff's performance of conduct protected by the Speech or Debate Clause. The affiant must have personal knowledge of the facts underlying his averment and otherwise must be able to assert a

Member's Speech or Debate Clause immunity. *See Gravel*, 408 U.S. at 618; *see also id.* 622 n.13 ("[A]n aide's claim of privilege can be repudiated and thus waived by the Senator.")[26] The affidavit must indicate into what "legislative activity" or into what matter integral to the due functioning of the legislative process the plaintiff's suit necessarily will inquire.

With that submission, the district court must then determine whether the asserted activity is in fact protected by the Speech or Debate Clause. If it is, the action most likely must be dismissed, as the failure to rebut a defendant's evidence with "evidence . . . that the[] proferred justifications were mere pretext" normally is fatal to a plaintiff's discrimination allegations. *Smith*, 430 F.3d at 455-56. If the lawsuit does not inquire into legislative motives or question conduct part of or integral to the legislative process, or if the district court determines that the asserted activity is not in fact part of or integral to the legislative process, then the case can go forward. *Cf. Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360-61 (D.C. Cir. 1990) (noting, in a different context, that where inquiry into a matter was forbidden "even for the purpose of showing it to be pretextual," the claim need not be dismissed because "it may turn out that the potentially mischievous aspects . . . are not contested . . . or are subject to entirely neutral methods of proof" and "[o]nce evidence is offered, the district court will be in a position to control the case"). We need not decide today whether a case in which the plaintiff uses evidence unrelated to legislative acts – such as direct evidence of discrimination or evidence that at the time of discharge the Senator offered a different reason for the employment action from the one alleged

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[26] A plaintiff therefore may challenge a defendant's eligibility to invoke the Speech or Debate Clause by arguing that the predicates for doing so under *Gravel* are not satisfied.

in the affidavit – to demonstrate that the defendant's legislative explanation is pretext requires more questioning of the defendant's legislative motives than the Speech or Debate Clause allows. We merely note that a plaintiff who seeks to prevail by quarreling with the defendant's statements about activity protected by the Speech or Debate Clause must fail.

We recognize that in operating this way the Clause effectively may preclude a plaintiff's discrimination suit. But this does not deprive the Accountability Act of all force, as Fields and Hanson suggest. Just as "a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts," *Brewster*, 408 U.S. at 512, so too a Member's personal office may be liable under the Accountability Act for misconduct provided that the plaintiff can prove his case without inquiring into "legislative acts or the motivation for legislative acts," *id.* And a plaintiff whose suit cannot proceed in federal court by operation of the Speech or Debate Clause still may avail himself of the Accountability Act's administrative complaint procedure. *See* 2 U.S.C. § 1405.

Accordingly, we now reject the *Browning* framework and affirm the judgments below because the Speech or Debate Clause does not bar jurisdiction in these cases.

Affirmed.

ROGERS, J., *concurring in part and in the judgment*: For reasons stated in the opinions of Judge Randolph and Judge Brown, I agree that the employee-duties test of *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), is overbroad and must be rejected. *See* Op. of Judge Randolph 17-20; Op. of Judge Brown 9-10.

I also agree that the Speech or Debate Clause does not pose a jurisdictional bar to Fields' and Hanson's lawsuits under the Congressional Accountability Act ("CAA"). Neither the history of the Clause nor Supreme Court precedent provides a basis on which to conclude that personnel decisions are "legislative acts" because, even when motivated by legislative considerations, the personnel decisions themselves are not "an integral part of the deliberative and communicative processes by which Members participate in [congressional] proceedings." *Gravel v. United States*, 408 U.S. 606, 625 (1972); *see Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1315 (10th Cir. 2004); *cf. Forrester v. White*, 484 U.S. 219, 229 (1988). Further, consistent with Supreme Court jurisprudence indicating the court should examine the pleadings to determine "whether it is necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute," *United States v. Brewster*, 408 U.S. 501, 526 (1972), an examination of the complaints makes clear that neither plaintiff must rely on legislative acts to make a *prima facie* case. *See* Op. of Judge Randolph 20-21.

I further agree that the Clause's evidentiary privilege, *see, e.g., United States v. Helstoski*, 442 U.S. 477, 487-90 (1979), has a role to play. *See* Op. of Judge Randolph 22-23; Op. of Judge Brown 19; Op. of Judge Tatel 3. Defining that role presents potentially difficult questions, particularly as the Supreme Court has yet to speak to the question in this context,

and its statements in other contexts can be understood to point in different directions, as the opinions of Judge Randolph and Judge Brown reflect. *Compare* Op. of Judge Randolph 25-26 (citing *Helstoski*, 442 U.S. at 489-90), *with* Op. of Judge Brown 20-21 (citing *Gravel*, 408 U.S. at 629 n.18).

For the reasons stated in Judge Brown's opinion, it is tempting to interpret the unique statutory scheme created by Congress in the CAA in a manner that allows discrimination and other claims to proceed against the Member's personal office largely unfettered by the protections afforded by the Speech or Debate Clause when Members or their alter egos are personally sued, *see* Op. of Judge Brown 11-17, 21; *see also* Op. of Judge Tatel 4. But Supreme Court jurisprudence has yet to so limit the reach of the Clause. *See* Op. of Judge Randolph 12-13 (citing cases); Op. of Judge Tatel 4. Nevertheless, it is not self-evident that the Clause's safeguards of legislative independence would be threatened by an approach that permitted CAA suits such as those before us to proceed subject only to protection of evidence of legislative acts produced by Members and their alter egos upon proper invocation of the privilege.

Because these are appeals of denials of motions to dismiss under Federal Rule of Civil Procedure 12(b)(1), the court need not address what happens when legislative acts arise as potential evidence in varying contexts in CAA litigation. It is unclear whether or precisely how these questions may arise upon the remand of the cases on appeal. The court would benefit from briefing based on the application of the evidentiary privilege by the district court in a particular context. Attempts to signal the answers to such questions are fraught with problems. Hence, I would leave open the question of how the Clause may limit evidence offered by parties in CAA litigation

and whether the role of the Member's personal office as the defendant under the CAA affects the application of the Clause.

Accordingly, I join Judge Randolph's opinion to the extent it is consistent with the views I have expressed.

TATEL, *Circuit Judge, concurring*: Though disappointed at our failure to reach consensus in this important case, I take some solace from the fact that the commonalities of our opinions exceed their differences—differences that relate to questions more easily answered after further factual development. I write separately to point out the commonalities, to briefly discuss the differences, and to suggest how the cases should proceed on remand.

First, the commonalities. All of us agree that *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 939 (D.C. Cir. 1986), extends further than the Speech or Debate Clause requires. *See* Op. of Judge Randolph 17; Op. of Judge Brown 10; Op. of Judge Rogers 1. All of us also agree, however, that the Speech or Debate Clause still has some role to play in employment discrimination cases, Op. of Judge Randolph 22; Op. of Judge Brown 19; Op. of Judge Rogers 1; and that the question of what precisely the Clause precludes is best resolved on a case-by-case basis, Op. of Judge Randolph, 25-27; Op. of Judge Brown 21; Op. of Judge Rogers 2-3. And all of us agree that the two district court orders should be affirmed.

What, then, divides us? After dispensing with *Browning*, the two principal opinions diverge. Judge Randolph's opinion for the court holds that because neither of the cases before us rests on legislative acts, we have no basis for dismissing them. Judge Randolph then points out that the Speech or Debate Clause may preclude some evidence, that in many employment cases it may preclude the very evidence upon which plaintiffs seek to rely, and that if it does, the suit may not proceed. The principal concurrence focuses on whether the defendant functions as a Member's alter ego, arguing that wide variations in Speech or Debate Clause protection hinge on the answer to that question. This approach would apply one version of the

Speech or Debate Clause if the defendant is a Member's alter ego and another if the defendant is not.

Not only do I find this distinction unworkable, but I do not understand what it means for a defendant to "be" a Member's alter ego. No one acts as a Member's alter ego all the time: even a Member's primary legislative aide does not act as the Member's alter ego when brushing her teeth. Whether an aide acted as a Member's alter ego turns on the particular *act* the aide performed on the Member's behalf. Reinforcing this point, *Gravel v. United States*, the first case to have used the term "alter ego," focuses on the aide's actions: "the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the *conduct* of the latter would be a protected legislative act if performed by the Member himself." 408 U.S. 606, 618 (1972) (emphasis added); *see also id.* at 621-22 ("the privilege applicable to the aide [must be] viewed . . . as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf, and . . . in all events the privilege available to the aide is confined to those *services* that would be immune legislative *conduct* if performed by the Senator himself" (footnote omitted) (emphasis added)); *id.* at 622 (noting that an aide can testify "at trials or grand jury proceedings involving third-party crimes" only if "the questions do not require testimony about or impugn a legislative act").

Of course, the person who performed the challenged action and the defendant in the litigation are often the same person (e.g., if the aide faces criminal or civil liability), so it is a convenient shorthand to say that only an alter ego can exercise the privilege to preclude litigation about particular conduct. But that shorthand refers to whether the person acted as the Member's alter ego when performing the (possibly) legislative act at issue, not to whether the aide "is" an alter ego at the time of the litigation. Even language from *Gravel*, upon which the

principal concurrence relies, comes from a section of the opinion emphasizing the conduct at issue over the defendant's identity. The statement "relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act," *id.* at 621, *quoted in* Op. of Judge Brown 20, appears in a paragraph beginning "[n]one of these three cases [*Kilbourn v. Thompson*, 103 U.S. 168 (1881), *Dombrowski v. Eastland*, 387 U.S. 82 (1967), and *Powell v. McCormack*, 395 U.S. 486 (1969)] adopted the simple proposition that immunity was unavailable to congressional or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection," *Gravel*, 408 U.S. at 620.

Focusing on particular actions rather than on the defendant's "status" as an alter ego suggests a simple rule: no Member or alter ego can be held liable for the performance of a legislative act. As Judge Randolph points out, however, these cases to not implicate that rule because neither Fields nor Hanson must prove the performance of a legislative act in order to prevail. Op. of Judge Randolph 20-21.

But the Speech or Debate Clause does not end there. We all agree that the Clause also precludes introduction of certain evidence and that this aspect of the privilege will come into play in these cases if a Member or an appropriate aide asserts it. *See id.* at 26 ("The affiant . . . must be able to assert a Member's Speech or Debate Clause immunity."); Op. of Judge Brown 21 ("[T]he Clause functions only as a testimonial and documentary privilege, to be asserted by members and qualified aides if they are called upon to produce evidence."). Still, we differ on how broad a role the Clause plays. The principal concurrence suggests that so long as aides neither producing the evidence nor defending the case, litigation can center on the

motivation for legislative acts. *See* Op. of Judge Brown 20-22. According to Judge Randolph, the Speech or Debate Clause precludes litigation in which a plaintiff seeks to meet the *McDonnell Douglas* burden by challenging the veracity of an aide's testimony about the motivation for legislative acts. *See* Op. of Judge Randolph 23-27 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Because judicial assessment of the aide's testimony would constitute "inquiry into legislative acts or the motivation for actual performance of legislative acts," *United States v. Brewster*, 408 U.S. 501, 509 (1972), I agree with Judge Randolph.

To be sure, I might prefer a more limited view of the Speech or Debate Clause's reach were I writing on a blank slate, but several Supreme Court decisions make clear that we must tread carefully in this area. *See* Op. of Judge Randolph 12 (citing cases). Indeed, "[r]ather than giving the [Speech or Debate] Clause a cramped construction, the [Supreme] Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Gravel*, 408 U.S. at 618. For this reason, I believe we must leave it to the Supreme Court to narrow the Speech or Debate Clause's reach. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should . . . leav[e] to [the Supreme] Court the prerogative of overruling its own decisions.").

Thus, although I agree that suits against congressional offices—as authorized by the Congressional Accountability Act—place less pressure on Members than would suits against Members personally, I cannot agree that the Clause's protection extends only to cases in which Members (or their aides) are witnesses or defendants. Nor do I share the principal concurrence's confidence that CAA cases will not "unduly

involve the judicial branch in the affairs of the legislative branch." Op. of Judge Brown 16. Certainly the language from *Gravel* upon which the principal concurrence relies—"We do not intend to imply . . . that in no grand jury investigations or criminal trials of third parties may third-party witnesses be interrogated about legislative acts of Members of Congress," *Gravel*, 408 U.S. at 629 n.18, *quoted in* Op. of Judge Brown 20—stands for no such proposition; *Gravel* states only that *some* testimony about legislative acts by third-party witnesses *may* be admissible, not that *all* such testimony *is* admissible.

For these reasons, I join Judge Randolph's opinion. Still, I emphasize that despite our differences, we all agree that on remand the district courts must determine whether particular aspects of these two cases implicate Speech or Debate Clause concerns. In my view, the district courts should focus on determining whether the cases may proceed without undue judicial "inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *Brewster*, 408 U.S. at 525. Because such determinations will necessarily be fact-bound, it is appropriate that we announce no blanket rule today. Once the district courts develop the factual records, the issues that divide this court may become clearer.

BROWN, *Circuit Judge, with whom* SENTELLE *and* GRIFFITH, *Circuit Judges, join, concurring in the judgment*: The Congressional Accountability Act of 1995 (the "Act"), 2 U.S.C. §§ 1301-1438, was the first legislation of the 104th Congress, adopted in the Senate by a vote of 98 to 1, and adopted unanimously in the House. Section 102(a) of the Act lists several federal laws that "shall apply . . . to the legislative branch of the Federal Government," including (1) the Fair Labor Standards Act of 1938, (2) Title VII of the Civil Rights Act of 1964, (3) the Americans with Disabilities Act of 1990, (4) the Age Discrimination in Employment Act of 1967, (5) the Family and Medical Leave Act of 1993, and (6) the Occupational Safety and Health Act of 1970. 2 U.S.C. § 1302(a). President Clinton described the Act as "a reform that requires Congress to live under the laws it imposes on the American people," commenting that "Washington has too often isolated itself from the every day experience of ordinary Americans." Remarks on Signing the Congressional Accountability Act of 1995, 31 Weekly Comp. Pres. Doc. 91, 91 (Jan. 22, 1995). In these cases, we address whether, and in what circumstances, the defendant in an action brought pursuant to the Act may assert the Speech or Debate Clause as a jurisdictional bar, thereby requiring summary dismissal of the action.

Our determination of this issue calls into question the framework we articulated in *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984), and *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), concerning applicability of the Speech or Debate Clause in employment litigation involving congressional employees. I conclude that the rule stated in those cases distorts the Speech or Debate Clause beyond its natural contours, and therefore I, too, would repudiate it and refocus our analysis on the terms of the Constitution and the relevant statements of the Supreme Court,

but I would approach the case in a somewhat different way than Judge Randolph.

I

A

Fields v. Office of Eddie Bernice Johnson, Employing Office, United States Congress, No. 04-5315: From January 2002 until March 2004, Beverly Fields was the chief of staff in the congressional office of Eddie Bernice Johnson, a member of the United States House of Representatives. On June 3, 2004, Fields brought an employment discrimination action under the Act, naming the "Office of Eddie Bernice Johnson" as the defendant as section 408 of the Act requires. *See* 2 U.S.C. § 1408. In her amended complaint, Fields claims the office actively sought an Asian person under the age of forty to replace a dark-skinned Latino employee. When the office selected a suitable Asian employee, it terminated the Latino employee, giving the employee only one day's notice. Fields objected and asked the office to allow the Latino employee to continue working for two more months, but the office allegedly rejected this request. About the same time, according to the complaint, the office began efforts to replace Fields, who is African American, with a white man. To that end, the office allegedly made false accusations against Fields regarding her job performance and her relationships with coworkers and then demoted Fields by taking away her supervisory responsibilities. Fields claims the demotion was based on her race and gender and that it was also in retaliation for her having intervened on behalf of the Latino employee. In addition, Fields alleges discrimination in regards to pay. Finally, Fields claims the office initiated a bad faith investigation of her conduct as an employee, seeking thereby to force her to resign, and when Fields refused to resign, the office allegedly terminated her.

Fields claims the investigation and subsequent termination were retaliatory.

The office moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1), claiming lack of jurisdiction based on the Speech or Debate Clause. According to a declaration filed by the office, Fields was integrally involved in executing Johnson's legislative agenda. Though many of her duties were administrative, Fields was also involved in formulating legislative strategy, advising Johnson on how to vote, approving Johnson's floor statements, drafting legislation, and conferring with staff of other legislative offices about various legislative initiatives.

On August 25, 2004, the district court denied the motion to dismiss in a two-line order, which stated no reasons, and on August 27, 2004, the office filed this interlocutory appeal.

B.

Hanson v. Office of Senator Mark Dayton, No. 04-5335: From January 2001 until September 2002, Brad Hanson held various positions in the congressional office of Mark Dayton, a member of the United States Senate. Throughout this time, Hanson was located in Fort Snelling, Minnesota. On May 29, 2003, Hanson brought an employment discrimination action under the Act, naming the "Office of Senator Mark Dayton" as the defendant. *See* 2 U.S.C. § 1408. In his complaint, Hanson claims he was hired as a "State Office Manager." His job allegedly involved setting up three local offices in Minnesota and overseeing a "Health Care Help Line," which assisted people with their healthcare coverage problems. He alleges he worked considerable overtime, for which he was not paid. In 2002, according to the complaint, Hanson developed a medical condition that required surgery and a few weeks' recovery time.

Hanson claims he met with Dayton on July 3, 2002, to tell Dayton of his need for this surgery. Five minutes into the meeting, Dayton allegedly said, "You're done," and he told Hanson he should no longer report to the office and should instead go on immediate medical leave. On July 17, 2002, a senior staff member allegedly called Hanson at home and told him he would be terminated as of September 30, 2002. The complaint alleges Dayton fired Hanson because Hanson needed time off to recover from surgery, in violation of the Family and Medical Leave Act of 1993, and also because Dayton erroneously perceived Hanson to be disabled, in violation of the Americans with Disabilities Act of 1990. The complaint further alleges that the failure to compensate Hanson for overtime violated the Fair Labor Standards Act of 1938.

The office moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1), claiming lack of jurisdiction based on the Speech or Debate Clause. According to a declaration filed by the office, Hanson's work included meeting with constituents, briefing the Senator on constituent concerns regarding healthcare and law enforcement, overseeing the "Health Care Help Line," and identifying possible legislative initiatives. The declaration asserts that Hanson's work enabled him to identify a problem regarding reimbursements to ambulance service providers, and it claims Hanson was part of a team that investigated this problem and advised Dayton, proposing legislative solutions. As a result of this advice, Dayton introduced a bill entitled the Medicare Ambulance Payment Reform Act of 2001, and Dayton also initiated a committee hearing to address this issue. The declaration states that Hanson helped plan the committee hearing, selected topics and witnesses, and developed questions for Dayton to ask at the hearing.

Hanson responded to this declaration with his own declaration stating that the office "exaggerates my role in legislation" and "[o]verall, I estimate that I did not spend more than five percent of my time on the type of legislative duties described in Senator Dayton's motion."

On September 7, 2004, the district court denied the motion to dismiss in a minute order, which stated no reasons, and on September 21, 2004, the office filed this interlocutory appeal.

C

In most circumstances, our jurisdiction to hear appeals from district court orders only extends to "final decisions," 28 U.S.C. § 1291. Under the collateral order doctrine, we also have jurisdiction to hear immediate appeals of certain interlocutory orders, *see Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), namely those orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Such orders must "present[] a serious and unsettled question" to be immediately appealable. *Cohen*, 337 U.S. at 547. "[T]he denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). This framework applies to claims of immunity under the Speech or Debate Clause. *See, e.g., Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). Because we have not yet had occasion to determine whether the personal offices of members of Congress may assert the protections of the Speech or Debate Clause, these cases present "serious and unsettled" questions

arising out of "substantial" claims of absolute immunity. We therefore have jurisdiction to consider these appeals under the collateral order doctrine.

II

The Constitution provides: "[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The historical record does not indicate any debate or controversy with respect to this provision. Very similar provisions appear in the Articles of Confederation and the English Bill of Rights of 1689. The Clause has its roots in centuries of struggle between the English Parliament and the Crown—struggle that sometimes erupted in armed conflict, with both Parliament and the Crown commanding independent armies. In more than one instance, royal troops arrested or attempted to arrest members of Parliament in reaction to speeches made and actions taken in Parliament. Coming in response to these confrontations, the Bill of Rights of 1689 established a bedrock legal foundation for the freedom of ideas within Parliament. Nearly a hundred years later, the Speech or Debate Clause established the same principle in American government. As the Supreme Court has explained, "the purpose of the Speech or Debate clause is . . . to preserve the independence and thereby the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 524 (1972).

> [T]he privilege was . . . born primarily of a desire . . . to prevent intimidation by the executive and accountability before a possibly hostile judiciary . . . There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum . . . is the predominate thrust of the Speech or Debate Clause.

United States v. Johnson, 383 U.S. 169, 181-82 (1966).

The Supreme Court first interpreted the Speech or Debate Clause in *Kilbourn v. Thompson*, 103 U.S. 168 (1881). *Kilbourn* involved a false imprisonment claim based on the plaintiff's arrest by the Sergeant at Arms of the House of Representatives. *Id.* at 170. The Sergeant at Arms was acting pursuant to a contempt finding of the House, *id.*, at 176-77, but the Supreme Court ruled the contempt finding improper, *id.* at 199-200. While the Court allowed the false imprisonment action against the Sergeant at Arms to proceed, it concluded that House *members* could claim immunity under the Speech or Debate Clause. *Id.* at 200-05. The Court adopted a principle of liberal construction as regards the Clause, extending its scope to legislative votes, reports, committee proceedings, and "'everything said or done . . . as a representative, in the exercise of the functions of that office.'" *Kilbourn*, 103 U.S. at 203 (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)).

Though *Kilbourn* made clear that the reach of the Speech or Debate Clause extends beyond a literal reading of its terms, several later Supreme Court decisions have carefully circumscribed the scope of the clause, holding that it applies only to *core legislative acts*, not incidental or peripheral activities of congressional offices. For example, in *Brewster*, the Supreme Court concluded that the Speech or Debate Clause "prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation of those acts." 408 U.S. at 512. The Court rejected a rule that anything "in any way related" to the legislative process was privileged, *id.* at 516, and it listed a variety of "political" activities that are not privileged, such as "'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to

constituents, news releases, and speeches delivered outside the Congress," *id.* at 512. *See also Hutchinson v. Proxmire*, 443 U.S. at 111, 131 (1979).

In *Gravel v. United States*, 408 U.S. 606 (1972), decided the same day as *Brewster*, the Supreme Court considered whether the clause protected the private publication of classified government documents. Senator Mike Gravel had placed the classified documents into the public record of a subcommittee meeting, but the Court concluded that a subsequent arrangement for private publication of the documents was not a protected legislative act. *Id.* at 625-26. The Court described the clause as covering only matters "integral [to] the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.* at 625. The Court then added that the protection "extend[s] . . . beyond purse speech or debate . . . , *but only when necessary to prevent indirect impairment of such deliberations*." *Id.* (emphasis added, internal quotation marks and citation omitted). In other words, the Court's relatively broad formulation of the Clause's scope was cabined by the requirement that the Clause should only apply to the extent necessary to protect actual speech or debate.

Unlike the Supreme Court, we have interpreted the Speech or Debate Clause in the employment litigation context. In *Walker*, 733 F.2d at 934, we held that the Clause permitted a general manager of the House restaurant to sue for sex discrimination. In that case, we posited a distinction between "staff . . . who help prepare for hearings or assist in the composition of legislative measures" and those who provide "[a]uxiliary services attending to human needs," and we held

that the latter group are not "'legislative' in character." *Id.* at 931. Judge MacKinnon concurred in part and dissented in part, arguing that the Speech or Debate Clause immunizes members of Congress from liability with respect to all employment decisions so long as those decisions *are treated as legislative* by Congress itself. *Id.* at 938 (MacKinnon, J., concurring and dissenting). Judge MacKinnon expressly rejected the court's measurement of Congress's actions against "some Platonic ideal of the 'legislative' process," arguing that Congress itself defines what is a legitimate subject of legislative decisionmaking. *Id.* In this regard, Judge MacKinnon noted that the restaurant manager had been terminated on the authority of a vote taken by a congressional subcommittee. *Id.* at 941-43.

Two years later, in *Browning*, 789 F.2d at 923, we held that the Speech or Debate Clause precluded any "judicial scrutiny" into the discharge of a House reporter whose job was to transcribe committee proceedings, *id.* at 924, and therefore it immunized Congress, its members, and their aides from liability, *id.* at 931. The court distinguished *Walker* on the ground that *Walker* involved an employee whose duties were not "directly related to the due functioning of the legislative process." *Id.* at 929 (emphasis omitted). The court articulated the following rule: "Where the duties of the employee implicate Speech or Debate Clause concerns, so will personnel actions respecting that employee." *Id.* at 928. Put another way, "[p]ersonal decisions are an integral part of the legislative process to the same extent that the affected employee's duties are an integral part of the legislative process." *Id.* at 928-29.

The line we drew in *Walker* and *Browning*, focusing on the complaining employee's *duties*, has some superficial appeal; its glaring flaw, however, is that it lacks any basis in the Speech or Debate Clause. Moreover, by defining very broadly the type of

duties that might constitute "an integral part of the legislative process"—even including within that definition a House reporter who lacked discretionary authority—we gave the immunity an unduly expansive scope. A rule of decision that more closely reflects the language and purpose of the Speech or Debate Clause would need to focus on the subject matter of the employee's lawsuit and the evidence the parties would need to present to the court, because the complaining employee's duties are an imperfect metric for probing whether the lawsuit will in fact force the court to inquire into protected matters. For example, even if a complaining employee's duties are central to the legislative process, as in the case of an employee who drafts legislation and floor speeches, the employee's lawsuit may turn factually on a series of overt requests for sexual favors and crude remarks, and therefore it may have nothing to do with the member's legislative activities. In short, by focusing on the duties of the complaining employee, *Walker* and *Browning* established a much broader immunity than necessary to protect legislative independence, and nothing in the Speech or Debate Clause or the Supreme Court's precedents compelled this broad immunity. Therefore, like Judge Randolph, Op. of Judge Randolph 18, I also would repudiate the reasoning used in *Walker* and *Browning* and proceed to the issue before us without the constraint of the framework imposed by those precedents.

III

In enacting the Congressional Accountability Act, Congress in effect sidestepped *Browning*'s broad formulation of immunity by designating the "employing office," rather than the member, as the defendant. 2 U.S.C. §§ 1301(9), 1408(b). Nevertheless, appellants in the two cases before us argue that the "employing office" can invoke the Speech or Debate Clause

on behalf of the member and thereby gain the benefit of the privilege. I reject this view.

First, it seems highly implausible, in light of Congress's unambiguous intention to open itself to liability under federal employment laws, that Congress designated a defendant that could invoke the member's Speech or Debate Clause rights. Why would Congress go to the trouble of designating the employing office as the defendant merely to create a bureaucratic redundancy able to assert the same privilege as the member?

Second, the Supreme Court has determined that a member's aide is permitted to invoke the Clause on the member's behalf because the aide acts *as an alter ego of the member*, working under the member's authority and subject to his direction. *Gravel*, 408 U.S. at 616-18. The same cannot be said of the employing office. This second point requires us to analyze exactly what the "employing office" is. Unfortunately, the law is not clear in this regard as it could be, but it is at least clear enough to say what the employing office is not; it is not an alter ego of the member.

The Act defines the "employing office" as

> (A) the personal office of a Member of the House of Representatives or of a Senator; (B) a committee of the House of Representatives or the Senate or a joint committee; (C) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or (D) [various specifically named offices within the legislative branch].

2 U.S.C. § 1301(9). For purposes of the cases before us, an "employing office" is the personal office of a member.

The personal office of a member, however, is not an independent legal entity, nor does it have any independent interests. It is not a person, nor a sovereign government, nor a branch of government, nor an agency created by statute, nor a chartered corporation, nor a trust, nor a partnership.[1] It is an organizational division within Congress, established for Congress's administrative convenience, analogous to a department within a large corporation. Therefore, an employee in the personal office of a member is in truth an employee of *Congress*, as to whom the member (acting on behalf of Congress) has supervisory control.

Title 2 of the United States Code is entitled "The Congress," and it deals generally with the administrative

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[1] The same, of course, might be said of a congressional committee, which would also qualify as an "employing office" under 2 U.S.C. § 1301(9). We are not here presented with a case involving a congressional committee as a defendant, but a committee arguably has a stronger claim to independent legal existence than a member's personal office in that a committee is formally established for certain express purposes and carries out actions in its own name, whereas a personal office exists only as a shell defendant to be sued under the Act. According to Judge Randolph, "the Supreme Court has held that legislative committees may invoke the [Speech or Debate] Clause." Op. of Judge Randolph 21 n.22 (citing *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951)). *Tenney* did not so hold. *Tenney* held that Congress did not intend 42 U.S.C. § 1983 to supplant common law principles of legislative independence by imposing possible civil liability on state legislative committees. *See* 341 U.S. at 376; *see also Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 732 (1980). Judge Randolph also relies on *Consumers Union of the United States, Inc. v. Periodical Correspondents' Ass'n.*, 515 F.2d 1341 (D.C. Cir. 1975). *Consumers Union* did not even involve a legislative committee as a defendant. Rather, it involved a private association, *id.* at 1345, that—like a legislative aide—acted on behalf of members of Congress, *id.* at 1350.

organization of Congress. Chapter 4 of Title 2, entitled "Officers and Employees of Senate and House of Representatives," governs employment-related administrative issues. Nothing in chapter 4 suggests that employees in member offices are anything other than congressional employees, or that member offices are anything other than administrative divisions within the two Houses of Congress. It is certainly true that Congress has chosen to adopt an administrative structure that gives great independence to its members. For example, each member of the Senate has a budget for employee compensation, 2 U.S.C. § 61-1(d)(1)(A); within the limits of that budget, "Senators may fix the number and the rates of compensation of employees in their respective offices" and "[a] Senator may establish such titles for positions in his office as he may desire to designate, by written notification to the disbursing office of the Senate," *id.* § 61-1(d)(2). Nevertheless, salary payments to these employees are administered centrally by the Secretary of the Senate. *Id.* § 60c-1. Similarly, members of the House of Representatives are authorized to employ as many as 18 permanent employees, *id.* § 92(a), but again, salary payments are administered centrally by the Chief Administrative Officer of the House of Representatives, *id.* §§ 60d-1, 95-1.

Thus, Congress has delegated to its individual members discretion in hiring, firing, and managing employees in their personal offices, but it did not make each of those offices into an independent government agency, and the employees remain employees of Congress as a whole. Congress could certainly choose to structure its administrative affairs in a different manner and may decide that stricter branch-wide personnel policies are warranted in order to limit violations of the Act. In any case, its current supervisory structure does not imply that the personal offices of its members are anything other than convenient administrative divisions.

For this reason, if we are to be legally precise, we cannot speak in terms of the "office" of a member taking a particular personnel action, because the "office" of the member is not a legal person. If a member hires or fires a legislative aide, the member makes a decision on behalf of the Congress, exercising power Congress has delegated to the member. *Cf.* 2 U.S.C. § 1301(9)(C) (designating as an "employing office" "any other office headed by *a person with* the final authority" to make personnel decisions (emphasis added)). The *office* of the member only gains some sort of quasi-legal existence when a dispute rises to the level of a suit under the Act. Then, the complaining employee has no choice but to name the member's office as the defendant because that is precisely what the Act instructs the employee to do. *Id.* § 1408(b). In sum, the "employing office" exists as a *prescribed label* for the defendant in a lawsuit under the Act, and it has no prior existence as an independent entity that took any specific action against the employee.

Therefore, though Congress has expressly designated the employing office as the *name* of the defendant, the question remains: Who is the real defendant behind the name? The answer to that question is not a simple one, but what is simple is that the member is not the real defendant, nor is the real defendant an alter ego of the member. First, Congress intended to subject the *legislative branch* to liability for violation of federal employment laws, not to subject its members personally to such liability. *See id.* § 1302. Second, *Congress's* attorneys defend the action. *See id.* § 1408(d); *see also* James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. ON LEGIS. 1, 10 n.46 (1999). Third, *Congress's* Office of Compliance has final settlement authority. *See* 2 U.S.C. § 1414. Fourth, funds appropriated to *Congress's* Office of

Compliance pay any settlement or judgment. *See id.* §§ 1381(a), 1415(a).

Moreover, nothing in the Act suggests that the member can make final litigation decisions on behalf of the employing office. It is true that the Executive Director of the Office of Compliance only has authority to approve or reject settlements "entered into by the parties," *id.* § 1414, implying that the employing office separately *negotiates* the settlement. However, it is not clear that the employing office would be under the direction of the member in this regard, especially because the member arguably has a personal interest in the litigation that is at odds with that of the employing office. Furthermore, this provision at most gives the member, acting as Congress's agent, an active role in the litigation; it clearly leaves the Office of Compliance as the final decisionmaker. It is also true that the Office of Compliance is to some extent an independent office within the legislative branch, subject to limited congressional oversight, *id.* § 1381, but if the Office of Compliance is not directly within Congress's control, it is certainly not within the *member's* control.

In short, the "employing office" is nothing like a member's aide, who can invoke the Speech or Debate Clause privilege on the member's behalf. Rather, by way of the Act, Congress sought to subject the legislative branch *as an institution* to federal employment laws. *Id.* § 1302(a). *Cf. Bastien v. Office of Senator Ben Nighthorse Campbell*, No. 01-cv-799, 2005 WL 3334359, at *4 (D. Colo. Dec. 5, 2005) ("[T]he term 'employing office' actually refers to Congress and Congress is the responsible entity under the CAA."), *quoted in* --- F.3d ---, 2006 WL 1756043, at *1 (10th Cir. June 28, 2006). Even if it is not quite apt to describe the "employing office" as an alter ego of Congress, it is far less appropriate to describe it as an

alter ego of the member.[2] Most accurately put, the "employing office" is an administrative division within Congress, designated to be named as the defendant in these actions. Nothing in that status suggests that an employing office can invoke a member's Speech or Debate Clause rights.

In addition, because the defendant in these suits is so differently situated than a member's aide, there is little reason to believe that allowing these suits to proceed will threaten legislative independence or unduly involve the judicial branch in the affairs of the legislative branch. Of course, the precise rationale of the Supreme Court in *Gravel*—that aides must be treated as members' alter egos because "the day-to-day work of such aides is so critical to the Members' performance," *Gravel*, 408 U.S. at 616-17—does not apply here because, under the Act, the employing office serves no role in a member's daily legislative work, functioning only as a defendant in employment suits. Nevertheless, *Gravel* also requires the court to extend Speech or Debate Clause protection if failing to do so "will inevitably . . .diminish[] and frustrate[]" the Clause's purposes of "prevent[ing] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *id.* at 617, or if "judicial oversight . . . realistically threatens to control [a member's] conduct as a legislator," *id.* at 618. I do not believe, however, that the limited judicial oversight the Act permits will contravene these standards.

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[2] Judge Tatel contends that "[w]hether an aide acted as a Member's alter ego turns on the particular *act* the aide performed on the Member's behalf." Op. of Judge Tatel 2. Statutorily, a member's personal office only exists as a defendant to be sued under the Act. As the office is not an entity—actual or judicial—that can take actions, *a fortiori* it cannot act on behalf of the member; it is therefore precluded from qualifying as an alter ego of the member. Given that conclusion, I see no need to determine whether particular acts alleged in the complaint were "legislative," as those acts were not performed by the office itself.

To begin, the pressures the Act places on the member are slight: The member bears no financial risk—either from a judgment or attorneys' fees. The member, through invocation of the evidentiary privilege, which I discuss below, can avoid distractions by refusing to testify or provide evidence regarding legislative acts. The member may face some embarrassment by having his or her personnel decisions placed under the microscope, but little more than he would due to any other publicity-generating event. The conduct at issue in these suits must be considered to be at or beyond the outer edge of what is "integral [to] the deliberative and communicative processes by which Members participate in committee and House [or Senate] proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.* at 625; *cf. Forrester v. White*, 484 U.S. 219, 229 (1988). Taken together, these considerations suggest that suits under the Act against the employing office do not "realistically threaten[] to control [a member's] conduct as a legislator." *Gravel*, 408 U.S. at 618.

Thus, I see no reason to conclude that the employing office in an action brought pursuant to the Act is entitled to invoke the Speech or Debate Clause, either on its own behalf or on behalf of a member. Clarifying this point is critical because it establishes that appellants in these cases cannot assert the Clause as a jurisdictional bar, regardless of whether the actions are predicated on legislative acts, and it also impacts how the Clause applies as an evidentiary rule.

Under the Supreme Court's cases, the Speech or Debate Clause often operates as an immunity from suit—or, more precisely, as a jurisdictional bar depriving courts of the power to hear the suit. In *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967), for example, the Court stated that, when the Speech or

Debate Clause applies, members of Congress "should be protected not only from the consequences of litigation's results but *also from the burden of defending themselves*." *Id.* at 85 (emphasis added). Similarly, in *Gravel*, the Court said that members of Congress are "shielded by the Speech or Debate Clause both from liability for their illegal legislative act and from having to defend themselves with respect to it." 408 U.S. at 620. And, in *Doe v. McMillan*, 412 U.S. 306, 318 (1973), the Court stated that certain acts "may not serve as a predicate for a suit" against members and aides, requiring dismissal of the complaint. Appellants here hope to gain the benefit of this jurisdictional bar, but allowing the suits to proceed will not force the members of Congress to bear the burden of defending the suits, nor will it subject the members to civil or criminal liability that might undermine their independence as legislators. Because appellants are not members of Congress, or alter egos of members, and therefore have no Speech or Debate Clause protection, the jurisdictional bar is not applicable.[3]

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[3] Because I conclude that members' offices cannot assert the protections of the Speech or Debate Clause, I do not reach the subsequent questions of whether the acts alleged in the complaints in these cases are "legislative" and the jurisdictional significance of that determination. *Cf.* Op. of Judge Randolph 20-21. However, if the defendants here could assert the Speech or Debate Clause, I believe the jurisdictional application of the clause might be broader than Judge Randolph suggests. For the purposes of the Speech or Debate Clause to be fulfilled, it arguably ought to bar as a jurisdictional matter not only lawsuits in which the complaints are predicated on legislative acts, but also suits that will inevitably necessitate an inquiry into such acts and motivations, even where such inquiry would arise due to an affirmative defense. *Cf. Davis v. Passman*, 442 U.S. 228, 235 n.11 (1979) ("*Defenses* based upon the Clause should thus ordinarily be given priority, since federal legislators should be *exempted from litigation* if their conduct is in fact protected by the Clause." (emphases added)). If, for example, a member is a named defendant in a state law tort action alleging wrongful termination, limiting the member to an evidentiary application of the Clause seems too restrictive.

That conclusion does not, however, suggest the Clause can play no part in these actions. The Supreme Court has also articulated an *evidentiary* application of the Speech or Debate Clause for those cases not requiring dismissal of the complaint on jurisdictional grounds. In *Brewster*, 408 U.S. 501, the Court stated that "a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." *Id.* at 512. Applying this rule, the Court permitted a bribery prosecution of a member of the Senate to go forward, because the prosecution focused only on whether the member received compensation in exchange for a *promise* to vote a certain way, and not on how the member *actually* voted or why. *Id.* at 525-27. Hence, the Court concluded that no "inquiry into a legislative act or the motivation for a legislative act [is] necessary to a prosecution under this statute or this indictment." *Id.*

In *United States v. Helstoski*, 442 U.S. 477 (1979), the court made clear that the holding in *Brewster*—permitting criminal prosecutions that do not rely on proof of legislative acts or the motives for such acts—should be applied as an evidentiary rule governing proceedings at trial. *Helstoski* concerned a criminal prosecution of a former member of the House in relation to "allegations that aliens had paid money for the introduction of private bills which would suspend the application of the immigration laws so as to allow them to remain in this country." *Id.* at 479. The Supreme Court instructed the trial court to apply the Speech or Debate Clause as a rule of evidence: "[*Johnson* and *Brewster*] leave no doubt that evidence of a legislative act of a Member may not be introduced by the Government in a prosecution . . . ." *Id.* at 487. "Nothing [however] in our opinion . . . prohibits excising references to legislative acts, so that the remainder of the evidence would be admissible." *Id.* at 488 n.7. "As to what

restrictions the Clause places on the admission of evidence, . . . [the Court's] concern is whether there is mention of a legislative act." *Id.* at 490.

In *Gravel*, 408 U.S. 606, as already discussed, the Court extended Speech or Debate Clause protections to congressional aides. The Court distinguished *Kilbourn*, noting that in *Kilbourn* (and other cases permitting civil actions against aides), "relief could be afforded [against the aide] without proof of a legislative act or the motives or purposes underlying such an act." *Id.* at 620-21. By contrast, if the lawsuit requires proof of a legislative act or the motive for such an act, then the aide can assert the Speech or Debate Clause protections. *Id.* at 621-22. Notably, the Court clarified in a footnote that its holding did not apply to cases in which the defendant was neither a member of Congress nor an alter ego of a member: "We do not intend to imply, however, that in no grand jury investigations or criminal trials *of third parties* may third-party witnesses be interrogated about legislative acts of Members of Congress." *Id.* at 629 n.18 (emphasis added).

The cases now before us present the situation contemplated in the footnote in *Gravel*, because the defendants in these cases are neither members of Congress nor aides of members, and as the *Gravel* footnote suggests, this fact is significant as regards the evidentiary application of the Clause.[4] In a civil or criminal

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[4] Under Judge Randolph's approach, a "case can go forward" if it "does not inquire into legislative motives or question conduct part of or integral to the legislative process," but should be dismissed if it would require any inquiry into legislative acts. Op. of Judge Randolph 27. While Judge Tatel purports to join Judge Randolph's opinion in full, he admits that, according to the *Gravel* footnote, at least some evidence of legislative acts may be admitted against third-party defendants. See Op. of Judge Tatel 5. Such a concession effectively undermines Judge Randolph's approach; the possibility of admitting such evidence means that many suits may

suit against a member or an aide, any inquiry into legislative acts amounts to an impermissible "question[ing]," in violation of the Speech or Debate Clause. *See Helstoski*, 442 U.S. at 489; *Brewster*, 408 U.S. at 525. This rule makes sense because, in order to defend the suit fully, the member or aide would have to respond to any evidence of legislative acts introduced against him, no matter the source of the evidence, and the member's silence might work to his disadvantage. In these cases, on the other hand, the defendants are not members or aides but employing offices, entities that cannot themselves assert the protections of the Speech or Debate Clause. The purposes behind the Speech or Debate Clause are not implicated by an inquiry into legislative acts in such cases, as the suits threaten neither the independence of the legislature as a whole nor of the individual members. Because the members are not defendants, the suits do not burden them with defense costs nor place them at any risk of personal liability, and as long as members and their aides are not themselves "questioned," an inquiry into legislative acts does not implicate the Speech or Debate Clause. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). Thus, where the member is not a party, the Clause functions only as a testimonial and documentary privilege, to be asserted by members and qualified aides if they are called upon to produce evidence. We need not explore the precise contours of this privilege today; the district court may address these problems as they arise. Of course, when the privilege makes relevant evidence unavailable, the parties will have to present their cases as best they can without the evidence, as would occur in other instances when non-parties possess privileged information.

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proceed even if they would entail some inquiry into legislative acts.

IV

The Supreme Court has liberally construed the Speech or Debate Clause, but it still remains tethered to its underlying purpose. *Brewster*, 408 U.S. at 516. Its purpose is not to immunize Congress from all liability; rather, its purpose is to ensure free and unrestrained discussion, debate, and decision relating to legislative matters. We can always hypothesize long cause-and-effect chains by which remote events were not the concern of the Framers of our Constitution when they included in that document a clause protecting legislative speech and debate. Rather, they were concerned with much more immediate threats to legislative independence. They were concerned that members of Congress would be arrested or held liable specifically on account of arguments they had voiced in the course of heated debates over pending legislative issues. *Johnson*, 383 U.S. at 182. They were concerned about the political rivalries that naturally arise among the several branches of government, rivalries that might cause a hostile executive or judiciary to harass a member of Congress who had been outspoken about some abuse of power. *Id.* at 179-81. In addressing these concerns, they did not intend "to make Members of Congress super-citizens," *Brewster*, 408 U.S. at 516, who could block all judicial inquiry into their personnel practices and workplace conduct.

Appellants in these actions are not members of Congress entitled to invoke the Speech or Debate Clause, nor are they alter egos of members. Therefore, the Speech or Debate Clause does not provide a basis for dismissing these actions; rather, it operates as an evidentiary protection for members of Congress and their aides who might be asked to provide evidence in these actions. For these reasons, I agree that we should affirm the district court's orders denying defendants' motions to dismiss.

APPENDIX B

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:03-cv-01149-RJL

HANSON v. OFFICE OF SENATOR MARK DAYTON
Assigned to: Judge Richard J. Leon
Cause: 42:1983 Civil Rights (Employment Discrimination)

Date Filed: 05/29/2003
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Job
Jurisdiction: U.S. Government Defendant

Plaintiff

BRAD HANSON
represented by **Richard A. Salzman**
HELLER, HURON, CHERTKOF, LERNER, SIMON & SALZMAN, PLLC
1730 M Street, NW
Suite 412
Washington, DC 20036
(202) 293-8090
Fax: (202) 293-7110
Email: salzman@hellerhuron.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

OFFICE OF SENATOR MARK DAYTON

represented by

Jean Marie Manning
OFFICE OF SENATE CHIEF
COUNSEL FOR EMPLOYMENT
103 Hart Senate Office Building
Room 103
Washington, DC 20510-0001
(202) 224-5424
Email: jean_manning@scce.senate.gov
ATTORNEY TO BE NOTICED

Toby R. Hyman
OFFICE OF SENATE CHIEF
COUNSEL FOR EMPLOYMENT
103 Hart Senate Office Building
Room 103
Washington, DC 20510-0001

03/12/2004	20	NOTICE of Change of Address by Jean Marie Manning. (Manning, Jean) (Entered: 03/12/2004)
09/07/2004		MINUTE ORDER denying 12 Motion to Dismiss by OFFICE OF SENATOR MARK DAYTON. Signed by Judge Richard J. Leon on 09/07/2004. (lcrjll,) (Entered: 09/07/2004)

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 04-5335 **September Term, 2006**

BRAD HANSON,
APPELLEE

v.

OFFICE OF SENATOR MARK DAYTON,
APPELLANT

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

Filed August 18, 2006

CLERK

Appeal from the United States District Court
for the District of Columbia
(No. 03cv01149)

Before: GINSBURG, *Chief Judge*, and SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND,* BROWN, GRIFFITH, AND KAVANAUGH,* *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

MANDATE
Pursuant to the provisions of Fed. R. App. Pro. 41(a)

Issued: 10/19/06
By: s/Michael C. McGrail

Attached: ___Amending Order
___Opinion
___Order on Costs

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/Michael C. McGrail

Michael C. McGrail
Deputy Clerk

Date: August 18, 2006

* Circuit Judges Garland and Kavanaugh did not participate in this matter.

Opinion for the court in part filed by Circuit Judge Randolph, in which Chief Judge Ginsburg and Circuit Judges Henderson and Tatel join.

Opinion concurring in part and in the judgment filed by Circuit Judge Rogers.

Concurring opinion filed by Circuit Judge Tatel.

Opinion concurring in the judgment filed by Circuit Judge Brown, in which Circuit Judges Sentelle and Griffith join.

APPENDIX D

Article I, Section 6, Clause 1 of the United States Constitution provides as follows:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

APPENDIX E

2. U.S.C. § 1413

§ 1413. Privileges and Immunities

The authorization to bring judicial proceedings under sections 1405(f)(3), 1407, and 1408 of this title shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any Senator or Member of the House of Representatives under article I, section 6, clause 1, of the Constitution, or a waiver of any power of either the Senate or the House of Representatives under the Constitution, including under article I, section 5, clause 3, or under the rules of either House relating to records and information within its jurisdiction.

2 U.S.C. § 1408(a) and (b)

§ 1408. Civil Action

(a) JURISDICTION.—The district courts of the United States shall have jurisdiction over any civil action commenced under section 1404 of this title and this section by a covered employee who has completed counseling under section 1402 of this title and mediation under section 1403 of this title. A civil action may be commenced by a covered employee only to seek redress for a violation for which the employee has completed counseling and mediation.

(b) PARTIES.—The defendant shall be the employing office alleged to have committed the violation, or in which the violation is alleged to have occurred.

2 U.S.C. § 1412

§ 1412. Expedited Review of Certain Appeals

(a) IN GENERAL.—An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this chapter.

(b) JURISDICTION.—The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal referred to in subsection (a) of this section, advance the appeal on the docket, and expedite the appeal to the greatest extent possible.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRAD HANSON	)	
Plaintiff,	)	
v.	)	**Case No. 1:03CV01149 (RJL)**
OFFICE OF SENATOR MARK DAYTON	)	
Defendant.	)	

DECLARATION OF MARC KIMBALL

I, Marc Kimball, have personal knowledge of the following facts, and I could and would testify to them if called to do so:

1. Senator Dayton was elected to serve as a U.S. Senator beginning in January 2001. I have been employed by the Office of Senator Mark Dayton ("the Office") in its Fort Snelling, Minnesota, office since its opening in January 2001.

2. I am the Office's Deputy Chief of Staff, and I have held that position since August 1, 2001. My responsibilities as Deputy Chief of Staff include overseeing all employees who work in Senator Dayton's offices located in Minnesota. From June 15, 2001, to August 1, 2001, I was the Office's Deputy State Director/Communications Director, and from January 3,

2001, to June 15, 2001, I was the Office's Communications Director.

3. Brad Hanson began working for the Office when it opened in January 2001. Throughout his employment with the Office, Mr. Hanson was assigned to the Fort Snelling office. From January 3, 2001, to March 1, 2001, Mr. Hanson's title was Office Manager/Case Worker; from March 1, 2001, to August 1, 2001, his title was Constituent Advocate; and from August 1, 2001, until the termination of his employment on July 3, 2002, he was the Director of Health Care Advocacy/State Office Manager. When Mr. Hanson began his employment with the Office, he was responsible for (i) setting up and opening Senator Dayton's Fort Snelling office; (ii) assisting in setting up the Senator's Thief River Falls and Biwabik state offices; (iii) helping constituents with problems mainly in the healthcare and law enforcement areas; (iv) attending constituent meetings and community events as the Senator's representative to learn of constituent concerns in the healthcare and law enforcement areas; and (v) briefing the Senator on developments, problems, and constituent concerns and opinions regarding healthcare and law enforcement. After the initial set-up of the state offices, although Mr. Hanson continued to perform some office manager duties, he spent most of his time working in the healthcare and law enforcement areas.

4. Improvement in healthcare is a paramount concern of Senator Dayton and has been a goal of his Office since its opening in 2001.

5. In early August 2001, the Office began a Health Care Help Line ("HCHL"), which is a "1-800" dedicated phone line that constituents could call to obtain assistance regarding denied medical care or refused third-party payments for such

care and to inform the Office about healthcare issues of importance to them. From the inception of the HCHL, Mr. Hanson was the Director of Health Care Advocacy and, as such, director of the HCHL.

6. I am aware that Senator Dayton's primary responsibility is to represent the people of Minnesota before the United States Senate and that he cannot effectively do that unless he is informed of Minnesotans' concerns and priorities. I also know that, due to the wide breadth of demands on his time, Senator Dayton cannot meet with every Minnesotan. Therefore, some of his employees, including Mr. Hanson when he was employed by the Office, must act as the Senator's representative by communicating with his constituents at meetings and on the telephone. During the course of Mr. Hanson's employment, his primary duties included meeting with, and fielding telephone calls from, constituents, community groups, and community leaders to learn, among other things, their (i) opinions about whether Senator Dayton should support or oppose certain legislation and (ii) suggestions regarding legislation Senator Dayton should introduce. Mr. Hanson acted as the Senator's eyes and ears during these meetings and telephone calls, and he gathered information that would inform the Senator in his legislative duties. The information Mr. Hanson gathered from constituents, which was passed on to Senator Dayton, helped shape the Senator's legislative agenda and assisted him in representing Minnesotans. Based on concerns constituents voiced to Mr. Hanson, he presented ideas to Senator Dayton that directly caused Senator Dayton (i) to initiate and to sponsor legislation in the United States Senate and (ii) to initiate a hearing before a Senate Committee of which Senator Dayton is a member.

7. Annexed as Exhibit 1 is a self evaluation Mr. Hanson completed in May 2001 setting forth his job responsibilities and

accomplishments during the first 4 to 5 months he was employed in the Office. Mr. Hanson's self evaluation states that one of his responsibilities was to obtain information, opinions, and concerns from constituents for the Senator. Further, Mr. Hanson listed the following among his accomplishments:

- Attended functions on Senator Mark Dayton's behalf;
- Attended meetings with community groups, representing Senator Dayton;
- Identified opportunities for the following legislative initiatives:
  a) Raising age of mandatory retirement for federal law enforcement officials;
  b) Obtaining Medicare payments for ambulances;
  c) Highlighting the importance of the COPS program to Minnesota agencies.

8. Annexed as Exhibit 2 is a self evaluation Mr. Hanson completed in the winter of 2001 setting forth his job responsibilities and accomplishments. Among the job responsibilities Mr. Hanson listed are:

- Define healthcare issues for legislative agenda;
- Write legislative briefs relative to healthcare;
- Brief Senator;

- Acquire information, opinions and concerns for Senator Dayton;
- Work with Washington, D.C. policy staff;
- Represent the Senator to organizations and individuals.

Among his accomplishments, Mr. Hanson listed:

- Attended Agency meetings representing Senator Dayton;
- Attended meetings with community groups, representing Senator Dayton;
- Held meetings around state to solicit information about Medicare reimbursement problems;
- Provided briefings for Senator Dayton as needed;
- Identified opportunities for legislative initiatives with respect to the following issues:
    a) Medicare payments for ambulances;
    b) The lack of government oversight to compel contract compliance for self-insured plans;
    c) The lack of coverage for prescription drugs for disabled Medicare recipients;
    d) Raising age of mandatory retirement for federal law enforcement officials;

e) Highlighting importance of the COPS program to Minnesota agencies.

In addition, the HCHL team, under the direction of Mr. Hanson, prepared drafts of an HCHL manual stating: "Legislation is a goal of the HCHL," "Identify and discuss patterns that suggest that legislation is needed" and "Report regularly to the Senator, Chief of Staff, and State Director."

9. After hearing from Minnesotans, Mr. Hanson told me in May or June 2001 that he had identified a pattern of problems concerning declining Medicare reimbursements to ambulance service providers and increasing payment delays. He suggested that he and I meet with Gary Wingrove of Gold Cross Ambulance Service and O.J. Doyle, an EMS consultant, to explore the problems and potential solutions.

10. Mr. Hanson and I met with Gary Wingrove and O.J. Doyle in the Office's Fort Snelling location. As a result of that meeting, Mr. Hanson and I decided to hold a series of meetings with constituents throughout Minnesota. The purpose of these meetings was to gather information from the ambulance service providers and others throughout the state concerning their reimbursement problems, the reasons for them, the economic and service repercussions from them, and their recommended solutions.

11. During the period June 14 through July 12, 2001, the Office held seven group constituent meetings in all parts of the state to help the Office grasp the extent and scope of the problems jeopardizing ambulance service in Minnesota. The meetings were held in Hibbing, Duluth, St. Cloud, Moorhead, Bemidji, Marshall, and Harmony, Minnesota. Mr. Hanson was one of the principal spokespersons and listeners for Senator

Dayton at all seven meetings. I participated in all of the meetings except the one in Marshall.

12. Taking into account the information we gathered from these meetings, Mr. Hanson and I discussed possible solutions to the problems we had learned from constituents. We also shared the information we had gathered and discussed potential solutions with various staff in our D.C. office, such as the Chief of Staff, the Legislative Director, and Legislative Assistants involved in healthcare matters. Mr. Hanson and I, along with the D.C. staff with whom we shared the information we had gathered, also educated Senator Dayton on the ambulance reimbursement problems the people of Minnesota were experiencing and suggested potential solutions to him. Annexed as Exhibit 3 is a memo to Senator Dayton that resulted from the information Mr. Hanson and I gathered at the various constituent meetings and the brainstorming sessions we subsequently had with other Office staff. The memo explains the various problems to the Senator and proposes several legislative options, along with a recommendation that the Government Subcommittee on Investigations, of which Senator Dayton is a member, study the issue.

13. As a direct result of the meetings Mr. Hanson held with constituents, Senator Dayton's staff, including Mr. Hanson, drafted, and Senator Dayton introduced, a bill, the Medicare Ambulance Payment Reform Act of 2001 ("MAPRA"). The legislation sought to remedy some of the ambulance repayment problems. Annexed as Exhibit 4 is an August 2001 article by O.J. Doyle, in which he states, "Introduction of the [MAPRA] bill was the culmination of hearings held around the state to determine the health of ambulance providers" and "Dayton and top staffers, Brad Hanson and Marc Kimball, have done a great job with this legislation and deserve our appreciation." Annexed as Exhibit

5 is an announcement of Senator Dayton's introduction of MAPRA. The announcement acknowledges that the legislation grew out of the meetings Mr. Hanson, I, and other members of our staff had with Minnesota ambulance providers that summer.

14. On November 15, 2001, the Senate Committee on Governmental Affairs held a public hearing entitled "Oversight of the Centers for Medicare and Medicaid Services: Medicare Payment Policies for Ambulance Services." This hearing, which Senator Dayton initiated and chaired, was one of the potential solutions Mr. Hanson, other members of the Dayton staff, and I had proposed to the Senator as a result of our constituent meetings and brainstorming sessions. Mr. Hanson was one of a few staff members who planned the hearing, decided on its issues, selected hearing witnesses, and prepared questions that Senator Dayton asked at the hearing. After the hearing, Mr. Hanson developed follow up questions that were submitted for the official hearing record.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 10 day of September 2003.

/s/
Marc Kimball

Brad Hanson ***May 11, 2001***

Job Evaluation

This job evaluation is to be completed by each staff member of Senator Dayton's Fort Snelling Office. Please return to Kate or Kim by May 11, 2001. This form will also be e-mailed to you for completion on the computer.

1. What are your job's responsibilities? What percent of your time is spent on each one?

    - State Office Manager (100% in January, 35% currently)
        - Oversee the office infrastructure.
        - Move furniture.
        - Provide for availability of standard office supplies.
        - Support PCs, Printers, copier, satellite TV, and cable connections.
        - Administrative NT server.
        - Facilitate reception desk coverage.
        - Educate as needed for PC applications.
        - Provide any other support to staff.
        - Handle callers, or people who drop in, that may be unstable, threatening, or generally difficult.
        - Maintain a safe environment.
        - Move furniture.

    - Constituent Advocate (65%, (64% casework, 1% outreach))
        - Receive and respond to correspondence.
        - Pursue casework on constituent's behalf.
        - Outreach - Represent Mark to organizations and individuals.
            - Criminal Justice agencies
                - Law enforcement agencies on all levels.

- Corrections workers.
- Emergency Medical Services (EMS)
  - Police, Paramedics, and Fire Rescue.
- Fire fighters.
- Health care providers.
- Health care insurance companies and HMOs.
- Guns (Although the NRA has not called me yet.)
- Social Security benefits when it is part of the Help Line.

- Acquire information, opinions, and concerns for Mark.
- Work with Washington policy staff.

2. What have you accomplished in the last three months?

Office Manager

- Set up the main office and arranged for furniture for out-state office.
- Established working relationships with facility management staff, Federal Protective Services, and with federal agencies that effect our existence.
- Acquired equipment as needed, including, but not limited to copier, fax machine, furniture, filing cabinets, printer paper, and pencil holders.
- Assisted State Director with new employees, handling forms, Ids, answering questions, etc.
- Provided training for office assistants.
- Developed and explained to staff office security procedures.
- Moved furniture.

Constituent Advocate

- Transitioned the Health Care Help Line (HCHL).
- Continued HCHL cases from campaign and started new ones.
- Advocated for Social Security cases.
- Advocated for prison health care cases.
- Attended functions on Mark's behalf.
- Attended meetings with community groups, representing Mark.
- Established connections with several law enforcement organizations.
- Identified opportunities for legislative initiatives.
    - Raise age of mandatory retirement for federal law enforcement.
    - Medicare payments for ambulances.
    - COPS program importance to Minnesota agencies.
- Handled numerous calls, providing support, answering questions, and researching for information, on a variety of topics of interest to constituents.

3. What do you intend to accomplish during the next three months?

- Move the Health Care Help Line to a high level of functionality.
- Establish a regular, probably quarterly, meetings with police chiefs.
- Expand my outreach efforts if casework allows.

4 How can the organization improve its performance and results over the next three months?

- Develop systems that efficiently handle the volume of correspondence and casework we receive.

5. Are you in agreement with the organization's Mission Statement, values and organizational culture? Yes.

   Is there anything you would change about, or add to, them? Not at this time.

6. What can the office (Mark, supervisor, co-workers) do to help you do your job better? What resources would help you do your job better?

   - I would benefit most from clerical help and intake phone assistance.
   - When Mark meets with organizations I deal with, any influence he can exert to persuade them to cooperate with case resolution would be extremely helpful to those we serve.

Office of Senator Mark Dayton
Winter, 2001

Job Evaluation

1. What are your job responsibilities? What percent of your time is spent on each one?

   Director of Health Care Help Line (70%)
   - Spokesperson
   - Oversight of casework
   - Coordination of health care related outreach
   - Train, advise, and monitor caseworkers
   - Selection of interns
   - Train interns and manage daily responsibilities
   - Field emergency and more difficult cases
   - Facilitate weekly meetings with Health Care Help Line team
   - Collect data and maintain database
   - Interpret data
   - Define health care issues for legislative agenda
   - Write legislative briefs relative to health care
   - Brief Senator
   - Establish and maintain connections with Federal, State, and local government health care related agencies, and with private agencies and insurance companies

   State Office Manager (20%)
   - Oversee the office infrastructure.
   - Support PCs, Printers, copier, satellite TV, and cable connections.
   - Liaison with Federal Building facilities management and Federal Protective Services
   - Administrative NT and Lotus servers.
   - Educate staff as needed on PC applications.

- Provide any other needed support to staff.
- Handle callers, or people who drop in, that may be unstable, threatening or generally difficult.
- Work with Washington Capitol Police when necessary.
- Maintain a safe environment.

Outreach - Represent Mark to organizations and individuals (5%)

- Health care providers.
- Health care insurance companies and HMOs.
- Emergency Medical Services (EMS)
- Police, Paramedics, and Fire Rescue.
- Criminal Justice agencies
- Law enforcement agencies on all levels.
- Corrections workers.
- Fire fighters.
- Social Security benefits when it is part of the Help Line.
- Guns (Although the NRA has not called me yet.)

Legislation (5%)

- Acquire information, opinions, and concerns for Mark.
- Work with Washington policy staff.

- What have you accomplished in the last six months?
  - Trained several caseworkers.
  - Advocated for Social Security cases.
  - Advocated for prison health care cases.
  - Attended Agency meetings representing Mark.
  - Attended meetings with community groups, representing Mark.
  - With Marc and Jim held meetings around state to solicit information about the Medicare reimbursement problems.
  - Established connections with several law enforcement organizations.

- Identified opportunities for legislative initiatives.
  - Medicare payments for ambulances.
  - Lack of government oversight to compel compliance with contracts for companies self insured plans
  - Lack of coverage for prescription drugs for disabled medicare recipients
  - Raise age of mandatory retirement for federal law enforcement.
  - COPS program importance to Minnesota agencies.
- Provided briefings for Mark as needed.
- Handled numerous calls, providing support, answering questions, and researching for information, on a variety of topics of interest to constituents.

2. What do you intend to accomplish during the next six months?
   - Continue the efforts currently in process.
   - Expand were possibilities present themselves. For instance: Work with some of the large ambulance providers to get Medicare reimbursement. Hennepin County was owed over two million dollars by mid year.
   - Expand my law enforcement connections.
   - Work with law enforcement departments and the military to get the program working that is supposed to be providing equipment to law enforcement.

3. How can the organization improve its performance and results over the next six months?

4. Are you in agreement with the organization's Mission Statement, values and organizational culture? Is there anything you would change about, or add to, them?

- I am in agreement and don't have any changes to suggest.

What can the office (Mark, supervisor, co-workers) do to help you do your job better? What resources would help you do your job better?

MEMORANDUM

July 2, 2001
TO: Mark
FROM: Kerri, Kimball, Katherine, and Fatima
RE: Ambulance Problems in Minnesota

Brad and Marc Kimball have held meetings with ambulance providers in Hibbing, Duluth, Moorhead, St. Cloud, and Bemidji, with attendance ranging from 15-30 attendees per meeting.

Below are the main issues they heard about:
1) The biggest concern amongst attendees was that Medicare is denying ambulance care claims. These are not isolated cases, and there does not appear to be a "standard rule" for denying these claims. Medicare is not processing all claims identically. Currently, Medicare's Health Care Financing Agency (HFCA) hires "for profit" companies–usually insurers–to process ambulance bills. These processors are now denying claims at a fast-increasing and alarming rate and doing so in a way that often pits ambulance providers against their patients.

Medicare's explanation to patients who are denied payment often faults the ambulance providers for errors in submitting the claim. This creates a situation where the patient is not only stuck with the bill, but is also under the impression that the ambulance provider–who may have actually saved the patient's life–is at fault.

What's worse is some beneficiaries have been burned by the system once or more are now hesitating to call an ambulance–even if they need it–so they aren't stuck with the costly, unpayable bill.

Emergency Medical Technicians (EMTs) complained that they must ask patients to fill out a form that states that they will be responsible for payment if Medicare denies payment. EMS providers feel that this is not an appropriated task for the EMT provider during an emergency.

Emergency Medical Service (EMS) providers **feel strongly** that the person who places the 911-call (a prudent layperson) should be the sufficient in determining if a patients needs ambulance service.

EXAMPLES:

- A patient drove to the store, went unconscious and hit a light pole. Someone called 911, the patient was discharged with a mini-stroke and Medicare denied the claim.

- A family member called 911 for a beneficiary and the claim was denied. Medicare stated that the family member could have brought the patient in his car.

- A patient needed to see his doctor. The doctor was at the local clinic instead of the hospital. The doctor requested the beneficiary be transported to the clinic. The claim was denied, the doctor wrote an appeal letter, the claim was denied a second time. Medicare doesn't pay for ambulance service to transport patients to clinics or nursing homes.

Legislative option: You are currently on a bill, *Sustaining Access to Vital Emergency Medical Services Act of 2001*, which calls for a "prudent lay-person" standard to be used on Medicare EMS calls. Passage of this bill would address one aspect of the problem.

You could offer legislation, modeled after current Minnesota law, that says Medicare must pay all ambulance related costs in an emergency if 911 is used. This is stronger than the legislation you are a cosponsor of.

Encourage the Government Subcommittee on Investigation to examine the problem and amend current rules.

2) According to Medicare, part of the problem with denials is in EMS coding. With the existing coding system for Medicare, the EMS providers have to use **doctor diagnosis codes**. EMS providers are not doctors and thus cannot diagnose a patient. EMS providers want to use **symptom** coding. Symptom codes will define the complaints.

An EMT or a paramedic is qualified to do only the following:

- Access the A-B-Cs
    - Airway
    - Breathing
    - Circulation
- Determine:
    - Chief complaint.
    - What precipitated complaint.
    - What are the current symptoms.
- Then the EMT or paramedic must stabilize and transport the patient.

- Treat the patient and maintain or improve their condition until they reach the hospital.

Option: Send a letter to HCFA Administrator, Thomas Scully, recommend that they adopt and mandate the use of already developed symptom coding system.

3) The final problem expressed by EMS providers is a proposed rule that implements a new Medicare fee schedule.

Fee Schedule

- The proposed fee schedule derived from the Balanced Budget Act of 1997, impacts Medicare ambulance reimbursement in two separate ways:
  - The development of a revenue-neutral ambulance fee schedule, using a negotiated rulemaking committee.
  - Ambulance providers would be under mandatory assignment. (The ambulance provider accepts whatever payment Medicare provides and cannot bill patient for any balance.)
- Last September, the Department of Health and Human Services proposed a rule that changes the fee schedule for Medicare ambulance services. The final rule has not been published yet.
- In Minnesota the average charge for ambulance service was $685. In 1999, the maximum reimbursement from Medicare was $578. The range was $112 to $578, with the average being $371. Under the new Medicare fee schedule, Minnesota ambulance services will see Medicare payments reduced by about half. **If the new fee schedule goes into effect, the MN Ambulance Association estimates that the state's ambulance providers will lose $37 million of the $140 Million they get from Medicare.**

- **EXAMPLE:** The city of Hibbing is currently at $740,000 in EMS revenue.
  - In the first year of the proposed rule the City will **lose $130,000**.
  - By the end of the fourth year of the proposed fee schedule the total effect will be a **$350,000 loss**.
  - Either taxpayer subsidizes the loss or services get cut.
- There would be 32 states/territories that would be adversely affected by this proposed fee schedule.

Legislative Option: Offer legislation requesting implementation of the final fee schedule rule be delayed until the GAO is able to further study the implications.

Legislative Option: Offer legislation requiring the Secretary of Health and Human Services use a fee schedule based on the Project HOPE Study.

Send a letter to Secretary Thompson outline your concerns with the proposed rule.

Minnesota State Legislature – Capitol UPDATE
By O.J. Doyle, EMS Consultant
August 2001
Volume 15, Issue 26

REDACTED

Senator Dayton – Bill Announcement

On August 3, Minnesota Senator Mark Dayton introduced S. 1350 - the Medicare Ambulance Payment Reform Act of 2001. Similar to previous legislation sponsored by former Senator Rod Grams, it seeks the prudent layperson standard for ambulance reimbursement: better means of defining "rural ambulance services" and improving reimbursements; and, an increase in Medicare reimbursement for ambulance.

The Senator changed his vacation plans to appear at a press conference on the steps of the State Capitol, in St. Paul, earlier this month to announce this important initiative. Introduction of the bill was the culmination of hearings held around the state to determine the health of ambulance providers. Over 25 ambulances and numerous personnel from around the state appeared with Senator Dayton. Three television and two radio stations were present and newspaper reporters put stories on the wire services.

Dayton and top staffers, Brad Hanson and Marc Kimball, have done a great job with this legislation and deserve our appreciation.

REDACTED

Date: 8/8/01 10:25 AM
Sender: Sara Howard
To: #Minnesota Offices; Dana Anderson; sbradach@cpinternet.com; Jim Gelbmann; Rebecca Gutierrez; Brad Hanson; Kate Jaycox; Barbara Johnson; Marc Kimball; Andrea Moerer; Shubha Muralidhara; Kristine Palmer; Kim Sobasky; Seng Vang; Gary Wertish; Laura Wolff; #Washington Office
Priority: Normal
Subject: Dayton announces ambulance legislation

For Immediate Release

Contact Marc Kimball 612-727-5220, Sara Howard 202-224-3244

August 8, 2001

Dayton Announces Legislation to Help Ensure Quality Ambulance Service in Minnesota, Across the Country
Says Medicare Policies and Procedures Threaten Ambulance Services, Patients Alike

FORT SNELLING, MN - Senator Mark Dayton, saying that reliable ambulance service is often a matter of life and death, today announced legislation to head off growing problems that are putting ambulance providers in Minnesota and across the country in financial jeopardy and affecting their ability to respond to patients who need care.

Dayton said his "*Medicare Ambulance Payment Reform Act*," introduced just before the August Congressional break, will help ambulance providers who are being threatened by inadequate Medicare payments and the inappropriate payment denials by Medicare claims processors. The continuing

difficulties jeopardize the level of care they can deliver, and ultimately may increase the time it takes them to respond to patients in an emergency, he said.

"When people in Minnesota and across the country have an emergency like a heart attack or stroke, they want to know that life-saving ambulance service will be available when they need it," Dayton said. "However, current Medicare policies and procedures jeopardize quality ambulance service and force many providers to struggle to stay in business - especially in rural communities. Putting patients' health and well being at risk is unacceptable. My legislation addresses problems that threaten ambulance service for patients in Minnesota and across the country."

This summer, Dayton's staff met with more than 100 ambulance providers, patients and other officials in communities across the state who are concerned that problems with the federal Medicare program are beginning to decrease the level of care they can deliver, and increase the time it takes them to respond to patient calls. Dayton's legislation grew out of those meetings with Minnesota ambulance providers.

Attached is an outline of Dayton's legislation.

APPENDIX G

[Filed October 31, 2006]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRAD HANSON	
Appellee,	
v.	**No. 04-5335**
OFFICE OF SENATOR MARK DAYTON	
Appellant.	

APPELLANT'S NOTICE OF APPEAL
TO THE UNITED STATES SUPREME COURT

Notice is hereby given that Office of Senator Mark Dayton (the "Dayton Office"), Appellant in the above-named case, hereby appeals to the Supreme Court of the United States from the judgment of the en banc panel of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-referenced action on August 18, 2006, affirming the district court's minute order that denied the Dayton Office's Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(1).

This appeal is taken pursuant to 2 U.S.C. § 1412.

Date: October 31, 2006

Respectfully submitted,

s/Jean M. Manning
Jean M. Manning
Senate Chief Counsel for
Employment

Toby R. Hyman
Senate Senior Counsel for
Employment

Office of Senate Chief Counsel
for Employment
P.O. Box 77053
Washington, D.C. 20013
Telephone: (202) 224-5424
Facsimile: (202) 228-2557

Attorneys for Appellant,
Office of Senator Mark Dayton

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2006, I sent a true and accurate copy of the foregoing Appellant's Notice of Appeal to the United States Supreme Court by first-class U.S. mail, postage pre-paid, to the following individuals:

Richard A. Salzman, Esq.
Douglas B. Huron, Esq.
Tammany M. Kramer, Esq.
Heller, Huron, Chertkof, Lerner,
Simon & Salzman
1730 M Street, NW
Suite 412
Washington, DC 20036

Attorneys for Appellee Brad Hanson

s/Kathleen Joseph
Kathleen Joseph

[Filed October 31, 2006]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRAD HANSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.**
	)	**1:03CV01149 (RJL)**
OFFICE OF SENATOR	)	
MARK DAYTON,	)	
	)	
Defendant.	)	
	)	

NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

Notice is hereby given that Defendant, Office of Senator Mark Dayton (the "Dayton Office"), hereby appeals to the Supreme Court of the United States from the judgment of the en banc panel of the United States Court of Appeals for the District of Columbia Circuit, entered in *Hanson v. Office of Senator Mark Dayton*, No. 04-5335, on August 18, 2006, affirming this court's September 7, 2004, minute order denying the Dayton Office's Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(1).

This appeal is taken pursuant to 2 U.S.C. § 1412.

Date: October 31, 2006 Respectfully submitted,

s/Jean M. Manning
Jean M. Manning
Senate Chief Counsel for
Employment
D.C. Bar No. 439942

Toby R. Hyman
Senate Senior Counsel for
Employment
Appearance pursuant to
Local Rule LCvR 83.2(e)

Office of Senate Chief Counsel
for Employment
P.O. Box 77053
Washington, DC 20013
Telephone: (202) 224-5424
Facsimile: (202) 228-2557
Attorneys for Defendant,
Office of Senator Mark Dayton

Supreme Court, U.S.
FILED
DEC 21 2006
OFFICE OF THE CLERK

(2)

No. 06-618

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OPPOSING MOTION TO DISMISS OR TO AFFIRM

JEAN M. MANNING
Senate Chief Counsel for Employment
Counsel of Record

TOBY R. HYMAN
Senate Senior Counsel for Employment

OFFICE OF SENATE CHIEF COUNSEL
FOR EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
(202) 224-5424

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In the Supreme Court of the United States

No. 06-618

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OPPOSING MOTION TO DISMISS OR TO AFFIRM

Appellant, Office of Senator Mark Dayton ("Dayton Office"), submits this brief in opposition to the Motion to Dismiss or to Affirm ("Motion") of appellee Brad Hanson ("Hanson") and in support of its Jurisdictional Statement.[1]

[1] At noon on January 3, 2007, Senator Dayton's term of office as a United States Senator will end (see U.S. CONST. Amend. XX, § 1), and the Dayton Office will cease to exist. Shortly thereafter, the Dayton Office will file a suggestion of mootness requesting this Court to vacate the D.C. Circuit's August 18, 2006, Order with respect to the Dayton Office and to remand this action to the D.C. Circuit with directions to vacate the district court's order and to dismiss this action as moot.

ARGUMENT

I. THIS CASE IS PROPERLY BEFORE THIS COURT ON APPEAL OR, ALTERNATIVELY, ON A PETITION FOR A WRIT OF CERTIORARI

A. The Congressional Accountability Act Provides For Direct Appeal From Courts Of Appeals, Not Just From District Courts

Hanson asserts that section 412 of the Congressional Accountability Act ("CAA"), 2 U.S.C. § 1412, "does not contemplate appeals to this Court from the courts of appeals" because in 1988 Congress repealed various statutory provisions that had provided for direct appeal to this Court from courts of appeals. Motion at 6. Appeals to this Court under CAA § 412 are not limited to appeals from district court decisions. Rather, section 412 provides that an appeal may be taken directly to this Court "from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this Act." 2 U.S.C. § 1412(a). Had Congress meant to limit CAA § 412 appeals to those taken from district court decisions, Congress would have so stated. See, *e.g.*, 18 U.S.C. § 700(d)(1) (Under the Flag Protection Act, an "appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).").

B. The Dayton Office's Appeal To This Court Is Timely

Referring to 28 U.S.C. § 2101(a) and (b), Hanson asserts that the Dayton Office's appeal is untimely. Motion at 5 n.5. Subsections (a) and (b), however, are inapplicable to this action

because they apply to direct appeals from three-judge and single-judge district courts, respectively. This action is governed by 28 U.S.C. § 2101(c), which provides that "[a]ny other appeal . . . intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken . . . within ninety days after the entry of such judgment or decree." The D.C. Circuit entered its judgment below on August 18, 2006, and the Dayton Office timely filed its notice of appeal on October 31, 2006.

C. This Action Is Also Properly Before This Court On A Petition For A Writ Of Certiorari

This action is properly reviewable by this Court not only by appeal under 2 U.S.C. § 1412 but also by writ of certiorari pursuant to 28 U.S.C. § 1254. Although repealed, 28 U.S.C. § 2103 provides guidance on this point. When title 28 of the U.S. Code provided for direct appeal to this Court from courts of appeals, it also provided that where such appeals were improvidently taken, the Court should regard the appeal as a petition for a writ of certiorari. 28 U.S.C. § 2103 (repealed 1988). Congress never intended that a party's decision to file a direct appeal precluded the party from filing a petition for a writ of certiorari. Given that this Court may review this action on a writ of certiorari, if this Court determines that appeal pursuant to 2 U.S.C. § 1412 was improvidently taken, the Court should treat the Dayton Office's appeal papers as a petition for a writ of certiorari.

II. SPEECH OR DEBATE CLAUSE IMMUNITY GOVERNS ALL ACTS WITHIN THE LEGISLATIVE SPHERE

Hanson argues that *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), does not provide guidance in this action because the President enjoys absolute immunity with respect to acts within the "outer perimeter" of his official responsibility, while this Court "has never held that Speech or Debate immunity extends to the 'outer perimeter' of legislative acts." Motion at 12. Irrespective of whether the Dayton Office's personnel actions against Hanson are at the outer perimeter or the center of the legislative sphere, they are within the legislative sphere. This Court has repeatedly held that the Speech or Debate Clause covers all acts within the legislative sphere. See, *e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) ("once it is determined that Members are acting within the legitimate legislative sphere, the Speech or Debate Clause is an absolute bar to interference") (internal quotation marks omitted); *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973) ("Congressmen and their aides are immune from liability for their actions within the legislative sphere even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.") (internal quotation mark and citation omitted).[2]

---

[2] Hanson erroneously asserts that the D.C. Circuit "unanimously decided that the Speech or Debate Clause does not bar suits under the CAA . . . ." Motion at 2-3; see also Motion at 7. The circuit court judges agreed, albeit for varying reasons, that the Speech or Debate Clause is not a jurisdictional bar to Hanson's suit, but at least four of the judges found that the Clause bars CAA suits where the pleadings show that the plaintiff seeks to predicate liability on a legislative act. Jurisdictional Statement App. 20a (opinion for the court in part filed by Randolph, J., joined by Ginsburg, C.J., and Henderson and Tatel, JJ.).

III. THE SCOPE OF THE SPEECH OR DEBATE CLAUSE IS AN ISSUE OF CONSTITUTIONAL INTERPRETATION TO BE DECIDED BY THIS COURT, NOT BY RESORTING TO SELECTIVE PORTIONS OF LEGISLATIVE HISTORY

Quoting comments of individual Senators from legislative history, Hanson states, "Congress considered – and rejected – the notion that judicial enforcement would transgress the Speech or Debate Clause." Motion at 17. As an initial matter, comments of individual Senators do not necessarily reflect Congress's intent. Furthermore, it does not matter whether one, some, or all members of Congress determined that court adjudication of CAA cases would not transgress the Speech or Debate Clause. The scope of the Speech or Debate Clause is an issue of constitutional interpretation, and constitutional interpretation rests with the courts. See *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("Many decisions of this Court . . . have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137 (1803), that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) (alteration in original). Further, even if statements of a few members of Congress expressed Congress's interpretation of the Constitution, this Court would not be bound by that interpretation. This Court has recognized, "Our system of government 'requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.'" *Nixon*, 418 U.S. at 704 (quoting *Powell v. McCormack*, 395 U.S. 486, 549 (1969)); see also *Gravel v. United States*, 408 U.S. 606, 628 n.17 (1972) ("surely we are not bound by the Government's view of the scope of the [Speech or Debate Clause] privilege").

IV. HANSON'S DUTIES WERE PART OF THE DUE FUNCTIONING OF THE LEGISLATIVE PROCESS

Hanson asserts, "This case is a particularly poor vehicle in which to undertake an exploration of the Speech or Debate Clause" because, he alleges, he was terminated due to his mismanagement of "the Health Care Help Line ['HCHL']" and the HCHL "was not legislative in character" but was merely errand running. Motion at 18. As an initial matter, the relevant issue is not the reason Hanson was terminated but whether his job duties were part of the due functioning of the legislative process. See Jurisdictional Statement at 16.

Also, when a personnel action is taken against an employee whose job duties are part of the due functioning of the legislative process, a court cannot inquire into the motives for those actions.

> The claim of an unworthy purpose does not destroy the privilege. . . . [I]t [is] not consonant with our scheme of government for a court to inquire into the motives of legislators . . . .

Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

Hanson's duties on the HCHL were part of the due functioning of the legislative process.[3] See Jurisdictional Statement at 4. Indeed, in his Winter 2001 Self Evaluation,[4] Hanson acknowledged that his HCHL duties encompassed defining healthcare issues for the legislative agenda, writing legislative briefs, and briefing Senator Dayton. C.A. App. A20. Such duties are part of the due functioning of the legislative process because a "'legislative body cannot legislate wisely, or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)).

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[3] Contrary to Hanson's assertion, the answer does not purport to set forth a full explanation for Hanson's termination. The answer states, "Hanson was terminated because of his poor job performance over an extended period of time" and shows a general lack of commitment on Hanson's part. C.A. App. A35 ¶ 1; see also A35-A36. ("C.A. App __" refers to the pages of the parties' Joint Appendix filed in the Court of Appeals for the District of Columbia Circuit on July 11, 2005, in Case No. 04-5335.)

[4] Hanson quotes *Clinton v. Jones*, 520 U.S. 681 (1997), to support his conclusion that this Court must assume the truth of the factual allegations of the complaint when analyzing the jurisdictional question presented. Motion at 3. A court is not required to accept factual allegations of the complaint as true where, as here, the defendant moved pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss for lack of subject matter jurisdiction and supported its motion with a declaration or other relevant material. See *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 184 (1936) (a court may consider materials outside the pleadings to satisfy itself that it has subject matter jurisdiction of the case).

CONCLUSION

The Court should note probable jurisdiction and should set the case for briefing and oral argument or, alternatively, should treat the papers on which the appeal was taken as a petition for a writ of certiorari and should grant certiorari.

Respectfully submitted.

JEAN M. MANNING
Senate Chief Counsel for Employment
Counsel of Record

TOBY R. HYMAN
Senate Senior Counsel for Employment

OFFICE OF SENATE CHIEF COUNSEL
FOR EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
(202) 224-5424

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OPPOSITION TO SUGGESTION OF MOOTNESS

DOUGLAS B. HURON *
RICHARD A. SALZMAN
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Attorneys for Appellee

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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OPPOSITION TO SUGGESTION OF MOOTNESS

Having filed an appeal, appellant now seeks to avoid any examination of the merits of its position and instead to deny relief altogether on grounds of abatement and mootness. Appellant's argument is premised on the misguided notion that the legal entity created to serve as the defendant in civil actions under the Congressional Accountability Act (CAA)—the "employing office"—ceases to exist when a Member leaves Congress. It does not. The language of the Act, as well as its structure and purpose, show that the expiration of a Member's term does not sound the death knell for actions properly commenced against an employing office.[1]

[1] CAA actions against Senate offices are defended by the Office of Senate Chief Counsel for Employment, which does not trouble to inform

The Court recognized more than half a century ago that the dissolution of a corporation does not necessarily moot a case: "a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions." *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634 (1949); *see Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 673-74 (1944) ("the moving papers fail to establish that the case is moot or has abated merely because of the dissolution of the corporate defendant"). Like a corporation in dissolution, the employing office for a Member whose term has expired has more than "enough life remaining to litigate its actions," as an examination of the statute reveals.

1. Examination of the Statute Shows that this Case Is Not Moot

The CAA applies eleven laws regulating the workplace to "the legislative branch of the Federal Government" generally. 2 U.S.C. § 1302(a). The statute provides that civil actions alleging violations of the incorporated statutes may be brought only against the pertinent "employing office," 2 U.S.C. § 1408(b), which is defined in 2 U.S.C. § 1301(9) to include

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the Court that the mootness argument was pressed in the *Bastien* case in the Tenth Circuit, where it was rejected. Specifically, after the court of appeals held that the Speech or Debate Clause did not deprive courts of jurisdiction to hear CAA claims, *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004), cert. denied, 126 S.Ct. 396 (2005), Senator Campbell's term expired, and the Office moved to vacate the judgment on grounds of mootness. The Tenth Circuit denied the motion but said it could be raised in district court on remand. 409 F.3d 1234 (10th Cir. 2005). The district court then ruled against the Office on the merits of abatement and mootness. 2005 WL 3334359 (D.Colo. 2005). At that point, the Office attempted an interlocutory appeal, arguing that the district court's order abridged sovereign immunity and the separation of powers and so was appealable under the collateral order doctrine. The Tenth Circuit disagreed and dismissed the appeal, 454 F.3d 1072 (10th Cir. 2006), and this Court recently denied certiorari, ___ S.Ct.___, 2007 WL 36160 (Jan. 8, 2007).

(among other things) "the personal office of a Member of the House of Representatives or of a Senator" and "a committee of the House of Representatives or the Senate or a joint committee." The CAA does not provide for suits against individuals, whether they are individual Members, committee chairmen or unelected staff.

The focus on offices rather than individuals as defendants bespeaks an interest in permanence and continuity. In this regard, committees remain in business regardless of the vagaries of election results or the terms of particular Members, so a similar mootness argument could not be made in a CAA case where the plaintiff is a committee staffer. There is nothing in the Act to suggest that those congressional employees who serve a Member are entitled to any less favorable treatment than those who work for a committee.

Here 2 U.S.C. § 1415 is particularly instructive. Subsection (a) of Sec. 1415 creates a special Treasury fund to satisfy judgments and settlements against employing offices, "[e]xcept as provided in subsection (c)," which exempts money needed to address certain OSHA and ADA matters. But nothing in Section 1415 exempts the money needed to satisfy a judgment against the office of a Member whose term has expired. On the contrary, the statute generally appropriates "such sums as may be necessary to pay such [non-exempted] awards." 2 U.S.C. § 1415(a).

Other provisions of the CAA likewise demonstrate the broad sweep of the "employing office" concept. For example, employing offices are prohibited from retaliating against employees who exercise rights under the Act, 2 U.S.C. § 1317(a); they assume affirmative obligations, such as granting protected leave for employees under the Family and Medical Leave Act or providing a safe workplace under OSHA, §§ 1312(a); 1341; employing offices attend mediation sessions, §1403(b); they are the named respondent in administrative claims and (as noted) the defendant in judicial actions,

§§ 1405(a), 1408(b); and they are defended in litigation by special counsel provided by Congress, *see, e.g.*, § 1408(d).

Judge Brown (joined by Judges Sentelle and Griffith), concurring in the judgment below, commented on the unique structure of the CAA:

> The personal office of a member . . . is not an independent legal entity, nor does it have any independent interests. It is not a person, nor a sovereign government, nor a branch of government, nor a chartered corporation, nor a trust, nor a partnership. It is an organizational division within Congress, establish for Congress' administrative convenience, analogous to a department within a large corporation. Therefore, an employee in the personal office of a member is in truth an employee of Congress, as to whom the member (acting on behalf of Congress) has supervisory control.

Appendix to Appellant's Jurisdictional Statement (App. App.) at 47a.

Instead of establishing the employing office, Congress could have provided for the naming of Members as defendants in CAA cases. *See Davis v. Passman*, 442 U.S. 228, 249 (1979) ("Congress could, of course, make *Bivens*-type remedies available to its staff employees") (Burger, C.J., dissenting). Congress chose instead to establish the employing office construct to cover the entire Legislative Branch, including areas such as committees or the Congressional Budget Office where the expiration of a Member's term is plainly inconsequential. 2 U.S.C. § 1301(9).

Even assuming that Congress included Members as possible CAA defendants and required them to pay judgments out of their own pockets, the expiration of a Member's term would not moot a case as long as there was a live dispute over money damages. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 498 (1969). Nor is there mootness here, where the fund created to satisfy CAA judgments provides no exemption for

situations in which a Member's term has expired. 2 U.S.C. § 1415.

Appellant claims that mootness and abatement occur whenever a Member leaves Congress. Adoption of this view could eviscerate the statute. Members accused of discrimination would have a profound incentive to delay the ultimate resolution of the case, until such time as they are ready to leave the particular office they hold.[2] For example, a typical staffer in a House Member's office would have at most two years to complete her case—including mandatory administrative exhaustion at the outset, *see* 2 U.S.C. § 1408(a), and continuing through final judgment in Federal court—to be assured of any rights under the CAA. A Member could short-circuit a claim at any point by resigning, depriving the aggrieved employee of any hope of remedy. This is an odd construction of a statute that was expressly passed to treat congressional employees the same as those in private enterprise: "the purpose of this legislation is to end the environment in this country where we have two sets of laws—one for Capitol Hill and the one for everybody else * * * It will end the situation where employees of Congress do not have the same employment and safety rights and access to the courts for the enforcement of those rights that private sector employees have." 141 Cong. Record S533 (remarks of Senator Grassley, co-sponsor and Republican floor manager of the CAA).

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[2] As noted in appellee's Motion to Dismiss or to Affirm at 2, appellant apparently sought to delay the final resolution of this case by failing to take the direct appeal to this Court available in September 2004, when the district court rejected appellant's Speech or Debate Clause argument. *See* 2 U.S.C. § 1412.

After the remand in *Bastien* (*see* n.1 above), the district court analyzed the language, structure and underlying purpose of the CAA to find that claims do not abate upon expiration of a Member's term:

> [t]he court must determine whether there is a party to respond to a judgment which might be entered in this case even though Senator Nighthorse Campbell no longer holds office. After reviewing the CAA, and studying its legislative history extensively, the Court finds that there is such a party. The CAA, along with its corresponding history, make clear that Congress is the party which must answer to claims filed thereunder, not the individual members. Thus, the fact that Senator Nighthorse Campbell is no longer in office is irrelevant.

2005 WL 3334359 at *3.

Bastien directly answers the suggestion of mootness here, but appellant does not address it. Instead, appellant relies on authority in which courts have confronted abatement in the context of legislation specifically dissolving (and fully extinguishing) a government agency or corporation. *See Asociacion de Empleados del Area Canalera (ASEDCA) v. Pan. Canal Comm'n*, 453 F.3d 1309, 1312 (11th Cir. 2006) ("On September 30, 2004, while Appellants' suit was pending, Congress passed a joint resolution that amended the Act and terminated the PCC and OTA as of October 1, 2004."). In these circumstances, Congress' desire to abate is manifest in the statute.

Similarly, in *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. at 636-37, Congress expressly dissolved the Defense Supplies Corporation (DSC) through a Joint Resolution and also provided for the substitution of another government corporation in litigation begun by DSC; the Court rejected an argument that a judgment obtained by DSC should be abated because the substitution was untimely. And in *Skolnick v. Parsons*, 397 F.2d 523, 524 (7th Cir. 1968), the lawsuit was deemed abated because the defendant President's

Commission on Law Enforcement and Administration of Justice "terminated by Presidential Order prior to the filing of the complaint."

In contrast, the CAA contains nothing dissolving an employing office upon the expiration of a Member's term. The cases cited by appellant do not support its plea for abatement.

2. The Inadequacy of Appellant's Other Arguments

Sovereign immunity. Appellant begins its brief with a head fake, cautioning that "the United States, as sovereign, is immune from suit save as it consents to be sued" and that waivers of sovereign immunity must not be implied. Suggestion of Mootness at 2. Sovereign immunity, however, is not an issue here, as the CAA expressly waived it for suits by covered employees: "Congress . . . unequivocally waived the sovereign immunity of a Member's personal office facing [CAA] allegations." App. App. at 11a.

Appellant's assertion of sovereign immunity here is simply misdirection, as the Tenth Circuit noted in dismissing an attempted appeal of the district court's order in *Bastien* finding no mootness:

> As much as the Office tries to couch its argument in terms of immunity and separation of powers, the issues are abatement and mootness. . . . These issues do not involve either immunity or separation of powers concerns. When Ms. Bastien originally filed this action, the district court had jurisdiction to hear the matter. The fact that Senator Campbell's term subsequently expired does not raise questions of either immunity or separation of powers.

454 F.3d at 1075.

The dispute over monetary relief. An action may be considered moot if there is no longer any relief that a successful plaintiff can obtain, and appellant suggests that the expiration

of Senator Dayton's term deprives Hanson of any remedy. In fact, though, Hanson can recover any monetary sums awarded from the funds authorized by Congress to satisfy judgments rendered under the CAA. 2 U.S.C. § 1415(a). Indeed, the only element of relief that ordinarily would be affected by a Member's departure from office is reinstatement. And long before Senator Dayton announced his decision not to run for reelection, Hanson stipulated that he was not seeking an order requiring his return to the job and would instead accept monetary relief. *See* Docket Entry 19 in No. 03-1149 (D.D.C.) (Oct. 30, 2003). The parties vigorously dispute Hanson's entitlement to a monetary remedy, which means the case is alive.

This Court confronted a similar issue in *Powell v. McCormack*, *supra*. There, the congressional officers being sued argued that Adam Clayton Powell's lawsuit was moot, because he had already won reelection. The injunction he had requested seeking reinstatement to the House of Representatives was, according to the defendants, unnecessary, and the lawsuit mooted. Rejecting that claim, the Court held:

> [E]ven if respondents are correct that petitioners' averments as to injunctive relief are not sufficiently definite, it does not follow that this litigation must be dismissed as moot. Petitioner Powell has not been paid his salary by virtue of an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties.

395 U.S. at 498; *see also Bond v. Floyd*, 385 U.S. 116 (1966) (the mootness of a "primary" claim does not necessarily mean that all "secondary" claims are similarly moot).

There is still abundant relief that Brad Hanson can recover if his claims are successful, and a fund exists to pay any monetary judgment. 2 U.S.C. § 1415. His case is not moot.

Vacatur. Finally, appellant asks that the D.C. Circuit's judgment be vacated, citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The petitioner in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), made a similar plea following settlement of a case for which certiorari had been successfully sought. The Court held that the petitioner had not borne the burden of demonstrating "equitable entitlement to the extraordinary remedy of vacatur," *id.* at 26, because this was not a situation in which "a controversy . . . has 'become moot due to circumstances unattributable to any of the parties.'" *Id.* at 23, *quoting Karcher v. May*, 484 U.S. 72, 82-83 (1987). Rather, the petitioner's "voluntary forfeiture of review constitutes a failure of equity." *U.S. Bancorp*, 513 U.S. at 26.

The Court also found the request for vacatur inconsistent with the public interest: "To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would . . . disturb the orderly operation of the federal judicial system." *Id.* at 27. Thus the Court denied the request for both public and private reasons.

Appellant here does not meet the demanding standards of *U.S. Bancorp* and *Karcher v. May*. On the contrary, the Office is engaged in a transparent effort "to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment," in a situation in which the supposed mootness is caused by its own conduct. In particular, appellant has tried to run out the clock by failing to take advantage of the expedited review available under the CAA. *See* n.2 above.

CONCLUSION

Senator Dayton's decision to leave public office does not nullify this lawsuit. Appellant's claims of abatement and

mootness are ill-founded, and the suggestion of mootness should be rejected.

Respectfully submitted,

DOUGLAS B. HURON *
RICHARD A. SALZMAN
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Attorneys for Appellee

3

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LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Attorneys for Appellee

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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IN THE

Supreme Court of the United States

No. 06-618

OFFICE OF SENATOR MARK DAYTON,
Appellant,

v.

BRAD HANSON,
Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

OPPOSITION TO SUGGESTION OF MOOTNESS

Having filed an appeal, appellant now seeks to avoid any examination of the merits of its position and instead to deny relief altogether on grounds of abatement and mootness. Appellant's argument is premised on the misguided notion that the legal entity created to serve as the defendant in civil actions under the Congressional Accountability Act (CAA)—the "employing office"—ceases to exist when a Member leaves Congress. It does not. The language of the Act, as well as its structure and purpose, show that the expiration of a Member's term does not sound the death knell for actions properly commenced against an employing office.[1]

[1] CAA actions against Senate offices are defended by the Office of Senate Chief Counsel for Employment, which does not trouble to inform

The Court recognized more than half a century ago that the dissolution of a corporation does not necessarily moot a case: "a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions." *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634 (1949); *see Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 673-74 (1944) ("the moving papers fail to establish that the case is moot or has abated merely because of the dissolution of the corporate defendant"). Like a corporation in dissolution, the employing office for a Member whose term has expired has more than "enough life remaining to litigate its actions," as an examination of the statute reveals.

1. Examination of the Statute Shows that this Case Is Not Moot

The CAA applies eleven laws regulating the workplace to "the legislative branch of the Federal Government" generally. 2 U.S.C. § 1302(a). The statute provides that civil actions alleging violations of the incorporated statutes may be brought only against the pertinent "employing office," 2 U.S.C. § 1408(b), which is defined in 2 U.S.C. § 1301(9) to include

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the Court that the mootness argument was pressed in the *Bastien* case in the Tenth Circuit, where it was rejected. Specifically, after the court of appeals held that the Speech or Debate Clause did not deprive courts of jurisdiction to hear CAA claims, *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004), cert. denied, 126 S.Ct. 396 (2005), Senator Campbell's term expired, and the Office moved to vacate the judgment on grounds of mootness. The Tenth Circuit denied the motion but said it could be raised in district court on remand. 409 F.3d 1234 (10th Cir. 2005). The district court then ruled against the Office on the merits of abatement and mootness. 2005 WL 3334359 (D.Colo. 2005). At that point, the Office attempted an interlocutory appeal, arguing that the district court's order abridged sovereign immunity and the separation of powers and so was appealable under the collateral order doctrine. The Tenth Circuit disagreed and dismissed the appeal, 454 F.3d 1072 (10th Cir. 2006), and this Court recently denied certiorari, ___ S.Ct.___, 2007 WL 36160 (Jan. 8, 2007).

(among other things) "the personal office of a Member of the House of Representatives or of a Senator" and "a committee of the House of Representatives or the Senate or a joint committee." The CAA does not provide for suits against individuals, whether they are individual Members, committee chairmen or unelected staff.

The focus on offices rather than individuals as defendants bespeaks an interest in permanence and continuity. In this regard, committees remain in business regardless of the vagaries of election results or the terms of particular Members, so a similar mootness argument could not be made in a CAA case where the plaintiff is a committee staffer. There is nothing in the Act to suggest that those congressional employees who serve a Member are entitled to any less favorable treatment than those who work for a committee.

Here 2 U.S.C. § 1415 is particularly instructive. Subsection (a) of Sec. 1415 creates a special Treasury fund to satisfy judgments and settlements against employing offices, "[e]xcept as provided in subsection (c)," which exempts money needed to address certain OSHA and ADA matters. But nothing in Section 1415 exempts the money needed to satisfy a judgment against the office of a Member whose term has expired. On the contrary, the statute generally appropriates "such sums as may be necessary to pay such [non-exempted] awards." 2 U.S.C. § 1415(a).

Other provisions of the CAA likewise demonstrate the broad sweep of the "employing office" concept. For example, employing offices are prohibited from retaliating against employees who exercise rights under the Act, 2 U.S.C. § 1317(a); they assume affirmative obligations, such as granting protected leave for employees under the Family and Medical Leave Act or providing a safe workplace under OSHA, §§ 1312(a); 1341; employing offices attend mediation sessions, §1403(b); they are the named respondent in administrative claims and (as noted) the defendant in judicial actions,

§§ 1405(a), 1408(b); and they are defended in litigation by special counsel provided by Congress, *see, e.g.*, § 1408(d).

Judge Brown (joined by Judges Sentelle and Griffith), concurring in the judgment below, commented on the unique structure of the CAA:

> The personal office of a member . . . is not an independent legal entity, nor does it have any independent interests. It is not a person, nor a sovereign government, nor a branch of government, nor a chartered corporation, nor a trust, nor a partnership. It is an organizational division within Congress, establish for Congress' administrative convenience, analogous to a department within a large corporation. Therefore, an employee in the personal office of a member is in truth an employee of Congress, as to whom the member (acting on behalf of Congress) has supervisory control.

Appendix to Appellant's Jurisdictional Statement (App. App.) at 47a.

Instead of establishing the employing office, Congress could have provided for the naming of Members as defendants in CAA cases. *See Davis v. Passman*, 442 U.S. 228, 249 (1979) ("Congress could, of course, make *Bivens*-type remedies available to its staff employees") (Burger, C.J., dissenting). Congress chose instead to establish the employing office construct to cover the entire Legislative Branch, including areas such as committees or the Congressional Budget Office where the expiration of a Member's term is plainly inconsequential. 2 U.S.C. § 1301(9).

Even assuming that Congress included Members as possible CAA defendants and required them to pay judgments out of their own pockets, the expiration of a Member's term would not moot a case as long as there was a live dispute over money damages. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 498 (1969). Nor is there mootness here, where the fund created to satisfy CAA judgments provides no exemption for

situations in which a Member's term has expired. 2 U.S.C. § 1415.

Appellant claims that mootness and abatement occur whenever a Member leaves Congress. Adoption of this view could eviscerate the statute. Members accused of discrimination would have a profound incentive to delay the ultimate resolution of the case, until such time as they are ready to leave the particular office they hold.[2] For example, a typical staffer in a House Member's office would have at most two years to complete her case—including mandatory administrative exhaustion at the outset, *see* 2 U.S.C. § 1408(a), and continuing through final judgment in Federal court—to be assured of any rights under the CAA. A Member could short-circuit a claim at any point by resigning, depriving the aggrieved employee of any hope of remedy. This is an odd construction of a statute that was expressly passed to treat congressional employees the same as those in private enterprise: "the purpose of this legislation is to end the environment in this country where we have two sets of laws—one for Capitol Hill and the one for everybody else * * * It will end the situation where employees of Congress do not have the same employment and safety rights and access to the courts for the enforcement of those rights that private sector employees have." 141 Cong. Record S533 (remarks of Senator Grassley, co-sponsor and Republican floor manager of the CAA).

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[2] As noted in appellee's Motion to Dismiss or to Affirm at 2, appellant apparently sought to delay the final resolution of this case by failing to take the direct appeal to this Court available in September 2004, when the district court rejected appellant's Speech or Debate Clause argument. *See* 2 U.S.C. § 1412.

After the remand in *Bastien* (*see* n.1 above), the district court analyzed the language, structure and underlying purpose of the CAA to find that claims do not abate upon expiration of a Member's term:

> [t]he court must determine whether there is a party to respond to a judgment which might be entered in this case even though Senator Nighthorse Campbell no longer holds office. After reviewing the CAA, and studying its legislative history extensively, the Court finds that there is such a party. The CAA, along with its corresponding history, make clear that Congress is the party which must answer to claims filed thereunder, not the individual members. Thus, the fact that Senator Nighthorse Campbell is no longer in office is irrelevant.

2005 WL 3334359 at *3.

Bastien directly answers the suggestion of mootness here, but appellant does not address it. Instead, appellant relies on authority in which courts have confronted abatement in the context of legislation specifically dissolving (and fully extinguishing) a government agency or corporation. *See Asociacion de Empleados del Area Canalera (ASEDCA) v. Pan. Canal Comm'n*, 453 F.3d 1309, 1312 (11th Cir. 2006) ("On September 30, 2004, while Appellants' suit was pending, Congress passed a joint resolution that amended the Act and terminated the PCC and OTA as of October 1, 2004."). In these circumstances, Congress' desire to abate is manifest in the statute.

Similarly, in *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. at 636-37, Congress expressly dissolved the Defense Supplies Corporation (DSC) through a Joint Resolution and also provided for the substitution of another government corporation in litigation begun by DSC; the Court rejected an argument that a judgment obtained by DSC should be abated because the substitution was untimely. And in *Skolnick v. Parsons*, 397 F.2d 523, 524 (7th Cir. 1968), the lawsuit was deemed abated because the defendant President's

Commission on Law Enforcement and Administration of Justice "terminated by Presidential Order prior to the filing of the complaint."

In contrast, the CAA contains nothing dissolving an employing office upon the expiration of a Member's term. The cases cited by appellant do not support its plea for abatement.

2. The Inadequacy of Appellant's Other Arguments

Sovereign immunity. Appellant begins its brief with a head fake, cautioning that "the United States, as sovereign, is immune from suit save as it consents to be sued" and that waivers of sovereign immunity must not be implied. Suggestion of Mootness at 2. Sovereign immunity, however, is not an issue here, as the CAA expressly waived it for suits by covered employees: "Congress . . . unequivocally waived the sovereign immunity of a Member's personal office facing [CAA] allegations." App. App. at 11a.

Appellant's assertion of sovereign immunity here is simply misdirection, as the Tenth Circuit noted in dismissing an attempted appeal of the district court's order in *Bastien* finding no mootness:

> As much as the Office tries to couch its argument in terms of immunity and separation of powers, the issues are abatement and mootness. . . . These issues do not involve either immunity or separation of powers concerns. When Ms. Bastien originally filed this action, the district court had jurisdiction to hear the matter. The fact that Senator Campbell's term subsequently expired does not raise questions of either immunity or separation of powers.

454 F.3d at 1075.

The dispute over monetary relief. An action may be considered moot if there is no longer any relief that a successful plaintiff can obtain, and appellant suggests that the expiration

of Senator Dayton's term deprives Hanson of any remedy. In fact, though, Hanson can recover any monetary sums awarded from the funds authorized by Congress to satisfy judgments rendered under the CAA. 2 U.S.C. § 1415(a). Indeed, the only element of relief that ordinarily would be affected by a Member's departure from office is reinstatement. And long before Senator Dayton announced his decision not to run for reelection, Hanson stipulated that he was not seeking an order requiring his return to the job and would instead accept monetary relief. *See* Docket Entry 19 in No. 03-1149 (D.D.C.) (Oct. 30, 2003). The parties vigorously dispute Hanson's entitlement to a monetary remedy, which means the case is alive.

This Court confronted a similar issue in *Powell v. McCormack*, *supra*. There, the congressional officers being sued argued that Adam Clayton Powell's lawsuit was moot, because he had already won reelection. The injunction he had requested seeking reinstatement to the House of Representatives was, according to the defendants, unnecessary, and the lawsuit mooted. Rejecting that claim, the Court held:

> [E]ven if respondents are correct that petitioners' averments as to injunctive relief are not sufficiently definite, it does not follow that this litigation must be dismissed as moot. Petitioner Powell has not been paid his salary by virtue of an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties.

395 U.S. at 498; *see also Bond v. Floyd*, 385 U.S. 116 (1966) (the mootness of a "primary" claim does not necessarily mean that all "secondary" claims are similarly moot).

There is still abundant relief that Brad Hanson can recover if his claims are successful, and a fund exists to pay any monetary judgment. 2 U.S.C. § 1415. His case is not moot.

Vacatur. Finally, appellant asks that the D.C. Circuit's judgment be vacated, citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The petitioner in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), made a similar plea following settlement of a case for which certiorari had been successfully sought. The Court held that the petitioner had not borne the burden of demonstrating "equitable entitlement to the extraordinary remedy of vacatur," *id.* at 26, because this was not a situation in which "a controversy . . . has 'become moot due to circumstances unattributable to any of the parties.'" *Id.* at 23, *quoting Karcher v. May*, 484 U.S. 72, 82-83 (1987). Rather, the petitioner's "voluntary forfeiture of review constitutes a failure of equity." *U.S. Bancorp*, 513 U.S. at 26.

The Court also found the request for vacatur inconsistent with the public interest: "To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would . . . disturb the orderly operation of the federal judicial system." *Id.* at 27. Thus the Court denied the request for both public and private reasons.

Appellant here does not meet the demanding standards of *U.S. Bancorp* and *Karcher v. May*. On the contrary, the Office is engaged in a transparent effort "to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment," in a situation in which the supposed mootness is caused by its own conduct. In particular, appellant has tried to run out the clock by failing to take advantage of the expedited review available under the CAA. *See* n.2 above.

CONCLUSION

Senator Dayton's decision to leave public office does not nullify this lawsuit. Appellant's claims of abatement and

mootness are ill-founded, and the suggestion of mootness should be rejected.

Respectfully submitted,

DOUGLAS B. HURON *
RICHARD A. SALZMAN
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Attorneys for Appellee

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No. 06-618

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUGGESTION OF MOOTNESS

JEAN M. MANNING
Senate Chief Counsel for Employment
Counsel of Record

TOBY R. HYMAN
Senate Senior Counsel for Employment

OFFICE OF SENATE CHIEF COUNSEL
FOR EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
(202) 224-5424

QUESTION PRESENTED

Does the fact that the Office of Senator Mark Dayton, the defendant in the action below, ceased to exist on January 3, 2007, require that the lower courts' decisions be vacated and the case be remanded with directions to dismiss as moot, where, in providing a limited waiver of sovereign immunity for suits, such as this one, brought under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438 (2000) ("CAA"), Congress specified the defendant and did not provide for substitution for a defunct defendant?

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This action abated and became moot on January 3, 2007, when the Dayton Office ceased to exist; accordingly, the Court should vacate the circuit court's decision and should remand with directions to vacate the district court's decision and to dismiss the action 2

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STATEMENT

Procedural Background

Brad Hanson ("Hanson") is a former employee of the Office of Senator Mark Dayton ("the Dayton Office"). On May 29, 2003, Hanson filed suit in the United States District Court for the District of Columbia alleging that the Dayton Office had violated the CAA by discriminatorily terminating his employment and failing to pay him overtime pay.

On September 12, 2003, the Dayton Office moved the district court to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that the Speech or Debate Clause of the United States Constitution provides the Dayton Office with absolute immunity from the action ("the Motion to Dismiss"). The district court issued a minute order on September 7, 2004, denying the Motion to Dismiss. J.S. App. 59a.[1]

On September 21, 2004, the Dayton Office appealed from the district court's denial of the Motion to Dismiss. The United States Court of Appeals for the District of Columbia Circuit, sitting en banc, heard the case on November 30, 2005. In a fragmented decision issued on August 18, 2006, the D.C. Circuit affirmed the district court's order denying the Motion to Dismiss. J.S. App. 27a, 28a, 57a, 60a-61a.

The Dayton Office filed its notice of appeal from the D.C. Circuit's order on October 31, 2006, and filed its Jurisdictional Statement with this Court on November 3, 2006.

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[1] "J.S. App. __" refers to the pages of the appendices to the Jurisdictional Statement the Dayton Office filed on November 3, 2006.

Relevant Facts

By constitutional mandate, Senator Dayton's term of office as a United States Senator ended at noon on January 3, 2007. See U.S. CONST. amend. XX, § 1. Upon the expiration of Senator Dayton's term of office, the Dayton Office ceased to exist.

ARGUMENT

THIS ACTION ABATED AND BECAME MOOT ON JANUARY 3, 2007, WHEN THE DAYTON OFFICE CEASED TO EXIST; ACCORDINGLY, THE COURT SHOULD VACATE THE CIRCUIT COURT'S DECISION AND SHOULD REMAND WITH DIRECTIONS TO VACATE THE DISTRICT COURT'S DECISION AND TO DISMISS THE ACTION

This case abated and is moot because a necessary party, the Dayton Office, ceased to exist and Congress has not authorized the substitution of another defendant in place of the Dayton Office.

"The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citations omitted). Waivers of sovereign immunity "cannot be implied," *United States v. King*, 395 U.S. 1, 4 (1969); rather, a "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text," *Lane v. Pena*, 518 U.S. 187, 192 (1996). Any "'limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.'"

Lehman v. Nakshian, 453 U.S. 156, 161 (1981) (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)).

Only Congress is empowered to enact statutes that subject congressional defendants to federal court litigation. See U.S. CONST. art. I, § 1; see also *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 95 (1981) ("federal lawmaking power is vested in the legislative, not the judicial, branch of government"); *United States v. N.Y. Rayon Imp. Co.*, 329 U.S. 654, 660 (1947) (holding that the Court of Claims "lack[ed] any power" to waive sovereign immunity because only Congress could provide the required statutory waiver of sovereign immunity).

Furthermore, only Congress is empowered to provide for a successor to a defunct government-entity defendant. See *Asociacion de Empleados del Area Canalera (ASEDAC) v. Panama Canal Comm'n*, 453 F.3d 1309, 1316 (11th Cir. 2006) (holding that a federal court cannot substitute an executive branch agency to defend a suit in place of a terminated government entity "[a]bsent an unequivocal statutory expression of Congress's intent to waive [that executive branch agency's] sovereign immunity"). When a defendant ceases to exist without a successor, the case cannot continue and litigation against the defendant abates. See *Def. Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634 (1949) (stating that unless statutory language provides otherwise, when a corporation dissolves, pending litigation abates because of the "'impossibility' of proceeding 'without a defendant'"); *ASEDAC*, 453 F.3d at 1314-16 (affirming government corporations' motion to dismiss when plain meaning of statute terminated the corporations and Congress did not provide for non-abatement of litigation and substitution); *Skolnick v. Parsons*, 397 F.2d 523, 525 (7th Cir. 1968) (holding that action

against federal commission abated when commission terminated without a successor).

The CAA, the statute on which Hanson's claims are based, specifies that the defendant in a CAA action "shall be the employing office alleged to have committed the violation, or in which the violation is alleged to have occurred." 2 U.S.C. § 1408(b). As relevant to this case, the CAA defines the term "employing office" as "the personal office . . . of a Senator." 2 U.S.C. § 1301(9)(A). When construing this definition, the Court "should prefer the plain meaning [of the statute's terms] since that approach respects the words of Congress." *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). As relevant to this action, the plain meaning of the phrase "personal office . . . of a Senator" is the Dayton Office. According to Hanson's Complaint, the alleged violations of the CAA were committed by and in the Dayton Office – the personal office of Senator Dayton when he served in the United States Senate. C.A. App. A3, A5-A6, ¶¶ 4, 17, 19, 21.[2]

By constitutional mandate, Senator Dayton's term of office as a United States Senator ended at noon on January 3, 2007. See U.S. CONST. amend. XX, § 1 ("[T]he terms of Senators and Representatives [shall end] at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified."). Upon the expiration of Senator Dayton's term of office, the Dayton Office ceased to exist.

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[2] "C.A. App __" refers to the pages of the parties' Joint Appendix filed in the Court of Appeals for the District of Columbia Circuit on July 11, 2005, in Case No. 04-5335.

The CAA does not contain any provision for naming a successor to a defendant employing office when that employing office ceases to exist.[3] Moreover, the CAA unequivocally prohibits reference to outside statutory authority to enlarge the CAA's jurisdictional grant. See 2 U.S.C. § 1410 ("Except as expressly authorized by sections 1407, 1408, and 1409 of this title, the compliance or noncompliance with the provisions of this [Act] . . . shall not be subject to judicial review."); see also 2 U.S.C. § 1413 ("The authorization to bring judicial proceedings under sections 1405(f)(3), 1407, and 1408 of this title shall not constitute a waiver of sovereign immunity for any other purpose . . . ."). Accordingly, this action against the Dayton Office has abated.

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[3] In contrast to the CAA, numerous other federal statutes explicitly provide for the avoidance of abatement and the substitution of parties in litigation involving government offices and entities that cease to exist. See, *e.g.*, 5 U.S.C. § 907(c) (2000) (providing that actions by or against the head of an executive branch agency do not abate by reason of an agency reorganization plan and that "within twelve months after the reorganization plan takes effect," a party may move for substitution of "the successor of the head . . . under the reorganization effected by the plan or, if there is no successor, against such agency or officer as the President designates"); 15 U.S.C. § 767(d) (2000) (providing that "[n]o cause of action by or against any department or agency, functions of which are transferred by [reorganization of executive branch functions and agencies to create the Federal Energy Commission] . . . shall abate by reason of the [reorganization]" and permitting substitution of the United States in such proceedings); 20 U.S.C. § 3505(d), (e) (2000) (providing that "[n]o cause of action by or against any department or agency, functions of which are transferred by [reorganization of the Department of Education] . . . shall abate by reason of the [reorganization]" and permitting substitution of the Secretary of Education in such proceedings); 22 U.S.C. § 6615(d), (e) (2000) (providing for "[n]onabatement of proceedings" and "[c]ontinuation of proceedings with substitution of parties" in connection with the reorganization and consolidation of the Foreign Affairs agencies); 22 U.S.C. § 6543(c), (d) (2000) (same); 42 U.S.C. § 7295(d), (e) (2000) (similar - Department of Energy).

When there are no longer adverse parties with sufficient legal interests to maintain litigation, the case is mooted. *Goldin v. Bartholow*, 166 F.3d 710, 717 (5th Cir. 1999). "A moot case presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents." *Id.*; see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." (internal citations and quotation marks omitted)). Further, when a case becomes moot through happenstance "while on its way" to this Court or "pending [this Court's] decision on the merits," this Court's practice is to vacate the lower court's judgment in the case and to order dismissal. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see also *Anderson v. Green*, 513 U.S. 557, 560 (1995) (holding that when case on review is rendered nonjusticiable, vacatur of both the appellate and district courts' judgments and dismissal of the case are appropriate). Vacatur is based on the equitable consideration that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). An action becomes moot through "happenstance" when the controversy presented for review has "become moot due to circumstances unattributable to any of the parties." *Karcher v. Ma* , 484 U.S. 72, 82 (1987); cf. *id.* at 83 ("[T]his controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party—the [State] Legislature—declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case."); *U.S. Bancorp Mortgage Co.*, 513 U.S. at 25 (holding vacatur does not apply where mootness results from settlement because "the losing party has

voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari").

This action is moot because, as explained above, two adverse parties to this litigation no longer exist. Therefore, the "case or controversy" requirement for this Court's jurisdiction is lacking. Further, this action became moot through happenstance because the Dayton Office's cessation was an unavoidable consequence of the expiration of Senator Dayton's term of office. The Constitution mandates the expiration date of a Senator's term of office. Accordingly, that the Dayton Office ceased to exist during the pendency of this lawsuit is a circumstance unattributable to the Dayton Office. Cf. *Doe v. Madison School Dist. No. 321*, 177 F.3d 789, 799 (9th Cir. 1999) (because case was mooted due to plaintiff's graduation from high school, case was mooted due to happenstance—the passage of time—and vacatur was appropriate); *Nat'l Football League Players Ass'n v. Pro-Football, Inc.*, 79 F.3d 1215, 1216-17 (D.C. Cir. 1996) (observing that vacatur of the district court decision would have been appropriate had the mootness been due to the fortuitous expiration of the 1993-94 football season but reversing previous order vacating judgment of the district court because mootness resulted from party dropping all claims to relief beyond the 1993-94 season). Because mootness occurred due to happenstance, this Court should vacate the D.C. Circuit's August 18, 2006, Order with respect to the Dayton Office and should remand this action to the D.C. Circuit with directions to dismiss this action as moot and to vacate the district court's September 7, 2004, Order denying the Dayton Office's Motion to Dismiss.

Respectfully submitted.

JEAN M. MANNING
Senate Chief Counsel for Employment
Counsel of Record

TOBY R. HYMAN
Senate Senior Counsel for Employment

OFFICE OF SENATE CHIEF COUNSEL
FOR EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
(202) 224-5424

JANUARY 2007

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(6)

No. 06-618

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR APPELLANT

JEAN M. MANNING
Senate Chief Counsel for Employment
Counsel of Record

TOBY R. HYMAN
CLAUDIA A. KOSTEL
DAWN BENNETT-INGOLD

OFFICE OF SENATE CHIEF COUNSEL
FOR EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
Phone (202) 224-5424
Facsimile (202) 228-2557

APPEAL DOCKETED NOVEMBER 3, 2006
JURISDICTION POSTPONED JANUARY 19, 2007

QUESTIONS PRESENTED

1. Does the Speech or Debate Clause of the U.S. Constitution, U.S. CONST. art. I, § 6, cl. 1, bar federal court jurisdiction of an action brought under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438 (2000), by a congressional employee whose job duties are part of the due functioning of the legislative process?

The Court directed the parties to brief the following additional questions:

2. Was the Office of Senator Mark Dayton entitled to appeal the judgment of the Court of Appeals for the District of Columbia Circuit directly to this Court?

3. Was this case rendered moot by the expiration of the term of office of Senator Dayton?

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In the Supreme Court of the United States

No. 06-618

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit, J.S. App. 1a-57a, is reported at 459 F.3d 1. The underlying decision of the U.S. District Court for the District of Columbia is an unreported minute order without opinion. J.S. App. 58a-59a.

JURISDICTION

The U.S. Court of Appeals for the District of Columbia Circuit entered judgment on August 18, 2006. J.S. App. 60a-61a. Appellant timely filed its notice of appeal on October 31, 2006, J.S. App. 90a-94a, and its Jurisdictional Statement on November 3, 2006. This Court has appellate jurisdiction under

section 412 of the Congressional Accountability Act of 1995, 2 U.S.C. § 1412. J.S. App. 65a.

In its Jurisdictional Statement, Appellant requested that the Court treat the Jurisdictional Statement as a petition for a writ of certiorari in the event the Court finds this appeal was improvidently taken and that the sole mode of review of the judgment of the court of appeals is by petition for a writ of certiorari. Appellant respectfully renews that request, although Appellant believes that 2 U.S.C. § 1412 provides this Court with appellate jurisdiction in this case. If this Court treats Appellant's Jurisdictional Statement as a petition for a writ of certiorari, jurisdiction is invoked under 28 U.S.C. § 1254(1).

On January 19, 2007, this Court postponed further consideration of the question of jurisdiction pending hearing on the merits. J.A. 24. This Court has not ruled on the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Speech or Debate Clause of the United States Constitution, U.S. CONST. art. I, § 6, cl. 1, is reproduced at J.S. App. 62a.

2. Section 1 of the Twentieth Amendment to the United States Constitution, U.S. CONST. amend. XX, § 1, provides as follows:

> The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

STATUTORY PROVISIONS INVOLVED

1. Section 101(9) of the Congressional Accountability Act of 1995, 2 U.S.C. § 1301(9), provides as follows:

> The term "employing office" means—
>
> (A) the personal office of a Member of the House of Representatives or of a Senator;
>
> (B) a committee of the House of Representatives or the Senate or a joint committee;
>
> (C) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or
>
> (D) the Capitol Guide Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment.

2. Subsections 408(a) and (b) of the Congressional Accountability Act of 1995, 2 U.S.C. § 1408(a), (b), are reproduced at J.S. App. 64a.

3. Section 412 of the Congressional Accountability Act of 1995, 2 U.S.C. § 1412, is reproduced at J.S. App. 65a.

4. Section 413 of the Congressional Accountability Act of 1995, 2 U.S.C. § 1413, is reproduced at J.S. App. 63a.

STATEMENT

This case addresses the scope of the immunity of the Speech or Debate Clause of the U.S. Constitution in employment law actions brought under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438 (2000) (the "CAA" or "Act"), against the personal office of a United States Senator. The D.C. Circuit, sitting en banc, interpreted CAA §§ 408 and 413, 2 U.S.C. §§ 1408, 1413, in a manner that permits court adjudication of CAA cases in violation of the Speech or Debate Clause. The D.C. Circuit held that the Speech or Debate Clause is not a jurisdictional bar to this case but that the Clause plays some role in the adjudication of CAA cases; however, the court could not reach a majority opinion as to what that role is. While recognizing that this is an "important case" raising "perplexing questions," J.S. App. 31a, 13a, the D.C. Circuit provided no clear guidance on how CAA cases can be adjudicated without violating the Constitution.

1. The CAA applies select provisions of eleven federal employment laws to congressional offices. 2 U.S.C. § 1302(a). The CAA provides covered employees with two alternative means of redress for alleged violations: an administrative hearing through the Office of Compliance, which is "an independent office within the legislative branch," 2 U.S.C. § 1381(a), and a civil action in federal district court. See 2 U.S.C. §§ 1404, 1405, 1408. These are the exclusive means of enforcing the rights granted under the Act. See 2 U.S.C. § 1361(d). The CAA provides that only a congressional "employing office" shall be a defendant in a CAA suit, 2 U.S.C. § 1408(b), and the Act defines the term "employing office," see 2 U.S.C. § 1301(9). The CAA expressly preserves Speech or Debate Clause immunity. See 2 U.S.C. § 1413.

2. Brad Hanson ("Hanson") is a former employee of the now defunct Office of Senator Mark Dayton ("the Dayton Office"). J.S. App. 67a ¶ 3. Senator Dayton represented the state of Minnesota. J.S. App. 68a ¶ 6. As an employee of the Dayton Office, Hanson met regularly with constituents, community groups, and community leaders to determine their concerns and priorities in the healthcare and law enforcement areas. Based on information he gathered from them, he identified and briefed Senator Dayton about opportunities for legislative initiatives. J.S. App. 67a-71a ¶¶ 3, 6-8; 74a-81a. For example, having learned of problems in Medicare reimbursement for ambulances, Hanson held meetings around Minnesota to determine the extent and scope of the problems, developed potential legislative solutions, and advised Senator Dayton that he should sponsor specific legislation and should hold a congressional hearing to address the problems. J.S. App. 71a-72a ¶¶ 9-12; 82a-86a. As a result, Senator Dayton introduced legislation and initiated a congressional committee hearing on Medicare reimbursement for ambulance services. Hanson was one of a few staff members who planned the hearing Senator Dayton initiated and chaired, decided on the issues for the hearing, selected hearing witnesses, and prepared questions that Senator Dayton asked at the hearing. Hanson also developed follow-up questions submitted for the official hearing record. J.S. App. 72a-73a ¶¶ 13-14; 87a-89a.

3. According to Hanson, he began experiencing cardiac arrhythmia in early 2002. His doctor told him that he would need a surgical procedure called a coronary ablation, which would require a short hospitalization, followed by a recovery period of two to three weeks. J.A. 12 ¶ 8. Hanson scheduled a brief meeting with Senator Dayton on July 3, 2002, when the Senator was going to be in the Fort Snelling office where Hanson worked. J.A. 12 ¶ 9. Hanson alleges that the meeting had not gone on for more than five minutes when Senator

Dayton abruptly told him, "You're done." J.A. 13 ¶ 10. According to Hanson, the Senator told him he should no longer report to the office but, rather, should go on medical leave. Hanson was subsequently informed that he would be taken off the payroll on September 30, 2002. J.A. 13 ¶ 11.

On May 29, 2003, Hanson filed suit in the U.S. District Court for the District of Columbia alleging that the Dayton Office had discriminatorily terminated his employment in violation of CAA §§ 201(a)(3) and 202(a), 2 U.S.C. §§ 1311(a)(3), 1312(a), because Senator Dayton erroneously perceived him to be disabled and because he needed to take leave to recover from heart surgery. J.A. 13-14 ¶¶ 13, 16-19. In addition, Hanson alleges that he was a non-exempt employee but was not paid overtime in violation of CAA § 203, 2 U.S.C. § 1313. J.A. 12-13 ¶¶ 6, 13; 15 ¶¶ 20-21.

On September 12, 2003, the Dayton Office moved to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that the Speech or Debate Clause provides the Dayton Office with absolute immunity from the suit. The Dayton Office relied on *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986). Without hearing oral argument, the district court issued a minute order on September 7, 2004, denying, with no stated reason, the motion to dismiss. J.S. App. 58a-59a.

4. The Dayton Office appealed to the D.C. Circuit from the district court's denial of its motion to dismiss for lack of subject matter jurisdiction. The D.C. Circuit, sitting en banc, heard the case.

In a fragmented decision, the D.C. Circuit affirmed the district court's order denying the Dayton Office's motion to dismiss. J.S. App. 27a, 28a, 57a, 60a-61a. The D.C. Circuit

rejected the test it had established in *Browning*, that "a Member's personnel decision is shielded from judicial scrutiny [by the Speech or Debate Clause] when 'the [affected] employee's duties were directly related to the due functioning of the legislative process.' [*Browning*, 789 F.2d] at 929 (emphasis removed)." J.S. App. 9a (second alteration in original); see also J.S. App. 18a, 27a, 28a, 36a, 45a. Aside from the *Browning* test, the only points on which a majority of the circuit court judges agreed are: (i) the Speech or Debate Clause does not bar the court's jurisdiction of Hanson's suit because an examination of the complaint shows that Hanson can make out a prima facie case without relying on legislative acts, J.S. App. 20a, 28a; and (ii) the Speech or Debate Clause plays some role in the adjudication of CAA cases, although the court was unable to reach consensus on what that role is. J.S. App. 21a, 28a, 31a, 54a. Circuit Judge Randolph, joined by Chief Judge Ginsburg and Circuit Judges Henderson and Tatel, found that where the defendant "provide[s] evidence of a legitimate nondiscriminatory reason for the discharge" and "include[s] with this evidence an affidavit from an individual eligible to invoke the Speech or Debate Clause recounting facts sufficient to show that the challenged personnel decision was taken because of the plaintiff's performance of conduct protected by the Speech or Debate Clause," J.S. App. 25a, then "the action most likely must be dismissed," J.S. App. 26a, because "[i]n many cases, the plaintiff would be unable to [demonstrate that the defendant's proffered reason was a pretext for discrimination] without 'draw[ing] in question' the legislative activities and the motivations for those activities asserted by the affiant – matters into which the Speech or Debate Clause prohibits judicial inquiry," J.S. App. 25a (citation omitted) (last alteration in original). Circuit Judge Brown, with whom Circuit Judges Sentelle and Griffith joined, concurring in the judgment, found that the Speech or Debate Clause "functions [in CAA cases] only as a testimonial and

documentary privilege, to be asserted by members and qualified aides if they are called upon to produce evidence" regarding legislative acts, but that "as long as members and their aides are not themselves 'questioned,' an inquiry into legislative acts does not implicate the Speech or Debate Clause." J.S. App. 56a. Circuit Judge Rogers, concurring in part and in the judgment, "agree[d] that the [Speech or Debate] Clause's evidentiary privilege has a role to play," J.S. App. 28a (internal citations omitted), but did not identify what that role is and "le[ft] open the question of how the Clause may limit evidence offered by parties in CAA litigation," J.S. App. 29a.

5. On October 31, 2006, the Dayton Office filed its notice of appeal to this Court. J.S. App. 90a-94a. On November 3, 2006, the Dayton Office filed its Jurisdictional Statement with the Court.

6. At noon on January 3, 2007, Senator Dayton's term of office expired. See U.S. CONST. amend. XX, § 1 ("[T]he terms of Senators and Representatives [shall end] at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified . . . .").[1] In turn, the Dayton Office closed. Br. App. 1a, 6a-13a.

SUMMARY OF ARGUMENT

1. This appeal asserts that the D.C. Circuit's judgment, allowing court adjudication of CAA claims by employees whose job duties are part of the due functioning of the legislative process, interprets and applies provisions of the CAA, 2 U.S.C. §§ 1408, 1413, in a manner that violates the U.S. Constitution's Speech or Debate Clause. Accordingly,

---

[1] The Court may take judicial notice of "the election and resignations of [S]enators." See *Brown v. Piper*, 91 U.S. 37, 42 (1875).

this appeal is upon the constitutionality of provisions of the CAA and is properly brought under CAA § 412, 2 U.S.C. § 1412. CAA § 412 does not preclude an appellant from also filing a petition for a writ of certiorari. In the event the Court concludes that CAA § 412 does not provide a proper basis for this appeal, the Dayton Office requests that the Court treat the Jurisdictional Statement as a petition for a writ of certiorari under 28 U.S.C. § 1254(1) and accept jurisdiction of this appeal on that basis.

2. The CAA explicitly requires that the defendant in a CAA action be the employing office "alleged to have committed the violation, or in which the violation is alleged to have occurred," 2 U.S.C. § 1408(b), which in this case is the Dayton Office. The Dayton Office, however, ceased to exist at noon on January 3, 2007, when Senator Dayton's term of office as a United States Senator ended.

a. When a defendant ceases to exist, the case cannot continue, and the litigation against the defendant abates, absent statutory language to the contrary. See *Def. Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634 (1949). The plain language of the CAA does not provide for non-abatement of actions. Furthermore, when Congress intends non-abatement it expressly so states.

An abated action does not survive unless a successor exists and is timely substituted for the defendant. See *Snyder v. Buck*, 340 U.S. 15, 19 (1950). No successor to the Dayton Office exists. Furthermore, well-established principles of statutory construction and sovereign immunity preclude the courts from inferring a successor. See *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Moreover, CAA § 410, 2 U.S.C. § 1410, expressly

prohibits reference to outside statutory authority to enlarge the CAA's waiver of sovereign immunity.

b. Because only one active combatant, Hanson, is extant, this case no longer presents an Article III case or controversy and should be dismissed as moot. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997).

3. Members of Congress are protected by the absolute immunity of the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1. The CAA expressly preserves Speech or Debate Clause immunity. 2 U.S.C. § 1413. The Speech or Debate Clause is grounded in separation of powers principles. The central role of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617 (1972). The Clause ensures legislative independence by providing members of Congress with an absolute immunity that protects them "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). The privilege ensures the independence of individual legislators. *United States v. Brewster*, 408 U.S. 501, 507 (1972).

This Court has consistently "read the Speech or Debate Clause broadly to effectuate its purposes," *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975), and has repeatedly held that the Clause protects *all* acts that are within the "legitimate legislative sphere," *id.* at 503. An act is within the legitimate legislative sphere when it is part of the "*due* functioning of the [legislative] process." *Brewster*, 408 U.S. at 515-16. The Speech or Debate Clause is not merely an evidentiary privilege; acts within the legislative sphere "may not serve as a predicate for a suit." *Doe v. McMillan*, 412 U.S.

306, 318 (1973). Also, courts are precluded from adjudicating any case that would require questioning, *Gravel*, 408 U.S. at 628-29, or would reveal information about a legislative act, *United States v. Helstoski*, 442 U.S. 477, 490 (1979), or the motivation for such an act, *Brewster*, 408 U.S. at 512; *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The claim of an unworthy purpose does not destroy the privilege. . . . [I]t [is] not consonant with our scheme of government for a court to inquire into the motives of legislators . . . ."), or would reveal communications between a Member and his aides regarding a legislative act, *Gravel*, 408 U.S. at 628-29. Furthermore, a Member cannot be made to answer -- in terms of defending himself -- for a legislative act or his motivation for such an act. See *id.* at 616.

a. The Court has recognized that it is literally impossible, in view of the complexities of the legislative process, for Members to perform their constitutional duties alone. Rather, they must delegate some of those duties to aides and assistants. *Gravel*, 408 U.S. at 616-17. The Court also has recognized that such employees are the Members' alter egos. *Id.* Therefore, legislative acts are performed not only by a Member but also by his aides and assistants. Legislative acts of alter egos include gathering and conveying to the Member information on matters critical to the Member's legislative agenda, see *Eastland*, 421 U.S. at 504, determining legislative initiatives, preparing for and attending congressional hearings, and communicating with a Member about any matter related to legislative acts, see *Gravel*, 408 U.S. at 609, 615-17, 624, 628-29.

A Member cannot perform his constitutional duties effectively or represent his constituents properly unless the Member manages his alter egos. When a Member manages his alter egos, the Member is taking an action that is part of the due functioning of his legislative process because by managing his

alter egos the Member is making his legislative process function the way he deems it should function to fulfill his constitutional duties. When a Member hires, assigns duties and geographic locations to, promotes, demotes, disciplines, and fires an alter ego, for example, those acts are part of the functioning of his legislative process. Therefore, the Speech or Debate Clause provides absolute immunity for those personnel actions, irrespective of the Member's motive for taking them.

Hanson's job duties were part of the due functioning of the legislative process. Therefore, the Speech or Debate Clause precludes court adjudication of Hanson's discrimination claims because they are predicated on a legislative act: his termination. This is true irrespective of the motive for the termination because a court cannot question a Member about the motive for a legislative act. Furthermore, Hanson cannot advance his case without revealing information about the termination, communications between him and Senator Dayton about the termination, and the motive for the termination. Also, the defense of the case would require Senator Dayton to answer for the termination and his motivation for the termination, which would violate the Speech or Debate Clause.

The Speech or Debate Clause also bars court adjudication of Hanson's overtime claim because determining whether Hanson is exempt from the overtime pay provisions requires examining his job duties in detail and thus inquiring into and revealing information about legislative acts because his job duties are part of the due functioning of the legislative process. Accordingly, the D.C. Circuit erred in holding that the district court is not barred from adjudicating this case.

b. The Court's decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), that the President, who has no textual immunity, is absolutely immune for personnel actions taken against a

Pentagon analyst, supports the soundness of the immunity test urged herein. Because the President's inferred, absolute immunity and Members' Speech or Debate Clause immunity are grounded in separation of powers principles, it would be incongruous for the President to have greater protection from Judicial Branch intrusion into employment decisions than do members of Congress.

c. Regardless of who the named defendant is, the Speech or Debate Clause bars court adjudication of any case that is predicated on a legislative act, or that would require questioning or would reveal information about a legislative act or the motivation for such an act, or would reveal communications between a Member and his aides regarding a legislative act, or would make a Member answer -- in terms of defending himself -- for a legislative act or his motivation for such an act.

d. The D.C. Circuit erred in relying on *Forrester v. White*, 484 U.S. 219 (1988), because that case addressed common law, judicial immunity, not textual Speech or Debate Clause immunity. Judicial immunity is narrower than Speech or Debate Clause immunity, and the jurisprudence with respect to the two immunities is not interchangeable. See *Eades v. Sterlinske*, 810 F.2d 723, 725 n.1 (7th Cir. 1987) ("[J]udicial immunity affords less protection than legislative immunity under the Speech or Debate Clause." (citing *Dennis v. Sparks*, 449 U.S. 24, 30 (1980))).

ARGUMENT

I. THE DAYTON OFFICE IS ENTITLED TO APPEAL THE JUDGMENT OF THE D.C. CIRCUIT TO THIS COURT

A. This Case Is Properly Before This Court On Appeal From The D.C. Circuit Pursuant To CAA § 412

The Dayton Office filed this appeal to challenge the D.C. Circuit's judgment that federal court adjudication of Hanson's CAA claims does not violate the Speech or Debate Clause of the Constitution. The Dayton Office appealed to this Court pursuant to CAA § 412, 2 U.S.C. § 1412, which authorizes direct appeal to this Court "from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this Act," and requires that this Court "shall, if it has not previously ruled on the question, accept jurisdiction over the appeal . . . and expedite the appeal to the greatest extent possible." As discussed below, this appeal satisfies the criteria of CAA § 412.

CAA § 408 authorizes federal district court adjudication of CAA claims, but CAA § 413 preserves Members' Speech or Debate Clause immunity. See 2 U.S.C. §§ 1408(a), 1413. Hanson sued the Dayton Office in federal district court pursuant to CAA § 408. See J.A. 11 ¶ 2. The Dayton Office has alleged that court adjudication of Hanson's claims would violate the Speech or Debate Clause. The D.C. Circuit concluded that the Speech or Debate Clause does not constitutionally bar court adjudication of Hanson's claims. Therefore, the D.C. Circuit's judgment allowing court adjudication of this suit is a "judgment . . . upon the constitutionality of [CAA §§ 408 and 413]" as applied to CAA

suits, such as Hanson's, that challenge a Member's management decisions affecting an employee whose job duties are part of the due functioning of the legislative process. 2 U.S.C. § 1412(a). This Court "has not previously ruled on the question" of whether the Speech or Debate Clause precludes federal court adjudication of Hanson's claims. 2 U.S.C. § 1412(b). Accordingly, this case is within the Court's jurisdiction under CAA § 412.

B. This Action Is Also Properly Before This Court On A Petition For A Writ Of Certiorari

This action is properly reviewable by this Court not only by appeal under CAA § 412 but also by writ of certiorari pursuant to 28 U.S.C. § 1254(1). Nothing in CAA § 412 precludes this Court from treating this appeal as a petition for a writ of certiorari.[2] Further, the Dayton Office effectively filed a timely[3] petition for a writ of certiorari by requesting that its Jurisdictional Statement be treated in the alternative as a petition for a writ of certiorari if this Court determines that appeal pursuant to CAA § 412 was improvidently taken. In that event, the Court should grant certiorari because of the importance of the Speech or Debate Clause in our constitutional scheme and because the D.C. Circuit's decision allowing court adjudication of a suit challenging a Member's personnel decisions with respect to an employee whose job

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[2] Moreover, this Court has the power to treat this appeal as a petition for a writ of certiorari. Cf. *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (treating application for stay of lower court's mandate as a petition for a writ of certiorari).

[3] The deadline for filing a petition for a writ of certiorari is ninety days after entry of the judgment. See 28 U.S.C. § 2101(c). The D.C. Circuit entered judgment on August 18, 2006, and the Dayton Office filed its Jurisdictional Statement on November 3, 2006.

duties were part of the due functioning of the legislative process violates the Speech or Debate Clause's bar of court adjudication of suits predicated on legislative acts or the motivation for such acts, undercuts separation of powers principles, and impermissibly allows judicial intrusion into the legislative sphere.

II. THE EXPIRATION OF SENATOR DAYTON'S TERM OF OFFICE RENDERED THE CASE MOOT BECAUSE THE DAYTON OFFICE, THE SOLE DEFENDANT, NO LONGER EXISTS

When Senator Dayton's term of office ended at noon on January 3, 2007, the sole defendant in this action, the Dayton Office, ceased to exist. As explained below, because only one active combatant remains in this litigation, this case no longer presents an Article III case or controversy and should be dismissed as moot. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997).

A. This Action Against The Dayton Office Abated When The Office Ceased To Exist Because The CAA, The Only Applicable Statute, Does Not Provide For Non-Abatement Or For A Successor Defendant

CAA § 408 explicitly requires that the defendant in a CAA action "shall be the employing office alleged to have committed the violation, or in which the violation is alleged to have occurred."[4] 2 U.S.C. § 1408(b). The term "employing office"

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[4] Courts have dismissed defendants that are not included among the employing offices the CAA delineates. See, *e.g.*, *Moss v. Lenhardt*, C.A. No. 02-01622 (RMC), Mem. Op. at 5 (D.D.C. Jan. 24, 2003) (dismissing case because "[n]either an individual nor the United States Senate

is a specifically defined term in the CAA. See 2 U.S.C. § 1301(9). As relevant to this case, the term "employing office" means "the personal office . . . of a Senator." 2 U.S.C. § 1301(9)(A). As set forth in Hanson's complaint, the alleged CAA violations were committed by and in the Dayton Office -- the personal office of Senator Dayton when he served in the United States Senate.[5] J.A. 11 ¶¶ 3, 4.

The Dayton Office, however, ceased to exist when Senator Dayton's term of office expired on January 3, 2007. The personal office of a Senator exists to assist a Senator during his or her term of office. See, *e.g.*, Br. App. 14a-15a (office purchases computer equipment with allocated funds); Br. App. 2a-4a, 16a (office provides constituent services on behalf of the Senator); Br. App. 5a (office ensures Senator's compliance with mass mailing requirements); Br. App. 17a-19a (office processes vouchers for all official expenses); Br. App. 20a-21a (office ensures compliance with legal requirements, including tracking overtime and completing employment eligibility forms required by law). Upon expiration of a Senator's term of

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constitutes an 'employing office' under section 1301(9) of the CAA") (unpublished); *Moore v. Capitol Guide Bd.*, 982 F. Supp. 35, 39 n.5 (D.D.C. 1997) (dismissing several named defendants because "the language of the statute requires an employee filing a claim in District Court to bring suit against the single employing office responsible for the alleged violation").

[5] The CAA provides a limited waiver of sovereign immunity with respect to claims brought against an employing office. 2 U.S.C. § 1408(b). "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Therefore, any "'limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.'" *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)). As such, the statutory language must be strictly construed, and the term "employing office" cannot be judicially expanded.

office, the office has no further authority to perform this function -- all office accounts with Senate support offices, such as the Stationery Room and the Senate Library, must reflect a zero balance; all employees must be removed from the payroll; the office cannot incur any financial obligations, including telephone and travel expenses; all subscriptions must be canceled; the Senate Post Office stops delivering mail to the office; and the Senator and his or her employees are required to vacate the physical office space. See Br. App. 1a, 6a-13a. As such, when Senator Dayton's term of office expired, the function of the Dayton Office -- to assist Senator Dayton while he served in the United States Senate -- was fully completed, and, having no further function or the ability to function, the Dayton Office ceased to exist. Cf. *Skolnick v. Parsons*, 397 F.2d 523, 525 (7th Cir. 1968) (holding that federal commission became *functus officio* once it completed its assignment).

When a defendant ceases to exist, a case cannot continue, and the litigation against the defendant abates, absent statutory language to the contrary. See *Def. Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634 (1949) (requiring express statutory non-abatement provision before finding that action did not abate against dissolved government corporation); see also *Snyder v. Buck*, 340 U.S. 15, 18-19 (1950) (holding that action against the Paymaster General abated when he retired because statute did not have a non-abatement provision and because petitioner had failed to substitute successor officer within the statutorily required six-month period); *Asociacion de Empleados del Area Canalera (ASEDAC) v. Panama Canal Comm'n*, 453 F.3d 1309, 1314 (11th Cir. 2006) (holding that action had abated against government entities because statute terminated the entities but did not include non-abatement provision).

In determining whether the applicable statute provides for non-abatement, the statutory language controls. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." (citations omitted)). "[T]he sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce [the statute] according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Moreover, courts cannot enlarge the statute by adding a non-abatement provision Congress omitted, even if the omission "lead[s] to a harsh outcome." *Id.* at 538; *ASEDAC*, 453 F.3d at 1316 (refusing to infer a non-abatement clause in a statute even though this abated litigation that had been pending for over three years). When Congress intends for non-abatement of actions, it expressly so states. See, *e.g.*, 5 U.S.C. § 907(c) (2000) (providing that actions by or against the head of an executive branch agency do not abate by reason of an agency reorganization plan and that "within twelve months after the reorganization plan takes effect," a party may move for substitution of "the successor of the head . . . under the reorganization effected by the plan or, if there is no successor, against such agency or officer as the President designates").[6]

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[6] See also 15 U.S.C. § 767(d) (2000) (providing that "[n]o cause of action by or against any department or agency, functions of which are transferred by [reorganization of executive branch functions and agencies to create the Federal Energy Commission] . . . shall abate by reason of the [reorganization]" and permitting substitution of the United States in such proceedings); 20 U.S.C. § 3505(d), (e) (2000) (providing that "[n]o cause of action by or against any department or agency, functions of which are transferred by [reorganization of the Department of Education] . . . shall abate by reason of the [reorganization]" and permitting substitution of the Secretary of Education in such proceedings); 22 U.S.C. § 6615(d), (e) (2000) (providing for "[n]onabatement of proceedings" and "[c]ontinuation

The CAA does not include a non-abatement provision. Although some CAA actions will abate and will leave a covered employee without the ability to seek relief, abatement does not eviscerate the CAA or lead to the conclusion that Congress intended to include a non-abatement provision in the statute. Rather, the statute itself mitigates the potential for abatement by providing an expedited hearing process through the Office of Compliance ("OC"). See 2 U.S.C. §§ 1402-1407. When a complaint is filed with the OC, the hearing must be held "no later than 60 days after filing of the complaint," and the OC may grant only one 30-day extension for good cause. 2 U.S.C. § 1405(d)(2). The covered employee alone has the right to decide whether to proceed through the expedited process or to file a complaint in district court. 2 U.S.C. § 1404. The covered employee runs the same risk as any other litigant -- that subsequent events may lead to the abatement of the action. Although occasional abatement may be unfortunate, abatement is not an absurd consequence, and the CAA should therefore be enforced as written. See *Lamie*, 540 U.S. at 534.

Further, Congress, which understands the vagaries of congressional terms, could have provided for Congress or the Senate to be the defendant in CAA actions rather than "the personal office of a Member," 2 U.S.C. § 1301(9)(A), an entity that will necessarily cease to exist at some point. Congress did not so provide. Instead, Congress considered and then rejected statutory language that would have permitted employment lawsuits against "the Congress" or against "the Senate." See, *e.g.*, S. 579, 103d Cong. § 2(c)(1) (1993) (would have permitted employment suits "against the Congress" in federal

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of proceedings with substitution of parties" in connection with the reorganization and consolidation of the Foreign Affairs agencies); 22 U.S.C. § 6543(c), (d) (2000) (same); 42 U.S.C. § 7295(d), (e) (2000) (similar -- Department of Energy).

court); H.R. 2099, 103d Cong. § 2(c)(1) (1993) (would have permitted a civil action "against the Congress or the congressional employer of such employee" in federal court); H.R. 4444, 103d Cong. § 102(c)(1) (1994) (would have permitted employment suits "against the Congress" in federal court); H.R. 4850, 103d Cong. § 2(c)(1) (1994) (would have permitted employment suits "against the Congress" in federal court); H.R. 4822, 103d Cong. § 306(b) (reported in the Senate Oct. 3, 1994) ("the defendant shall – (1) in an action by an employee of the Senate, be the Senate"). Accordingly, this action abated on January 3, 2007.

An abated action does not survive unless a successor defendant exists and is timely substituted for the named defendant. *Snyder*, 340 U.S. at 17-19 (affirming dismissal of action because neither party substituted respondent's successor after action abated against respondent); *ASEDAC*, 453 F.3d at 1314 (affirming dismissal of action because the lawsuit had abated against government entities and Congress had not "provided for a successor that [could] stand in for these defunct entities as a defendant in this litigation"). The CAA does not contain a successor provision. Moreover, the Court cannot name or infer a government successor because "the United States may not be sued without its consent." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). In addition, the CAA expressly prohibits reference to outside statutory authority to enlarge the CAA's waiver of sovereign immunity. See 2 U.S.C. § 1410 ("Except as expressly authorized by sections 1407, 1408, and 1409 of this title, the compliance or noncompliance with the provisions of this [Act] . . . shall not be subject to judicial review."); see also 2 U.S.C. § 1413 ("The authorization to bring judicial proceedings under sections 1405(f)(3), 1407, and 1408 of this title shall not constitute a waiver of sovereign immunity for any other purpose . . . .").

Because the CAA does not provide for either non-abatement or a successor defendant and because the Dayton Office no longer exists, this case abated at noon on January 3, 2007, for lack of a defendant. See *Snyder*, 340 U.S. at 19-20.

B. This Case No Longer Presents A Case Or Controversy And Should Be Dismissed As Moot

In the absence of a live controversy, a federal court is deprived of jurisdiction because "Article III, § 2, of the Constitution confines federal courts to the decision of 'Cases' or 'Controversies.'" *Arizonans for Official English*, 520 U.S. at 64. "'[An] actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Id.* at 67 (citation omitted). When there are no longer two parties to the litigation, it no longer presents a case or controversy. See *Ellis v. Dyson*, 421 U.S. 426, 434 (1975) ("[I]t is elemental that there must be parties before there is a case or controversy."); see also *Martinez v. Winner*, 800 F.2d 230, 231 (10th Cir. 1986) ("There can be no live controversy without at least two active combatants."). When a case no longer presents an actual controversy, the case is moot. See *Arizonans for Official English*, 520 U.S. at 67 (holding case moot because it no longer presented an actual controversy).

Because one of the adverse parties to this litigation, the Dayton Office, ceased to exist, this case no longer meets Article III's "case or controversy" requirement. Accordingly, the Court should dismiss the case as moot.

III. THE SPEECH OR DEBATE CLAUSE BARS FEDERAL COURT JURISDICTION OF THIS CAA ACTION

Members of Congress are protected by Speech or Debate Clause immunity, U.S. CONST. art. I, § 6, cl. 1. The CAA expressly preserves Speech or Debate Clause immunity. 2 U.S.C. § 1413 ("The authorization to bring judicial proceedings under [the CAA] . . . shall not constitute a waiver of . . . the privileges of any Senator or Member of the House of Representatives under article I, section 6, clause 1, of the Constitution . . . ."). As explained below, in most cases, when an employee's job duties are part of the due functioning of the legislative process, the Speech or Debate Clause bars court adjudication of the employee's CAA claims because they are necessarily predicated or rely on, or require questioning or reveal information about, a legislative act or the motive for it, or require a Member to answer -- in terms of defending himself -- for a legislative act or the motivation for such an act. Therefore, the D.C. Circuit erred in affirming the decision of the district court denying the Dayton Office's motion to dismiss.

The Speech or Debate Clause is a "'great and vital privilege . . . without which all other privileges would be comparatively unimportant or ineffectual.'" *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, § 866). The central role of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617 (1972) (citing *United States v. Johnson*, 383 U.S. 169, 181 (1966)). The Clause is grounded in separation of powers principles that are necessary "to preserve the constitutional structure of separate, coequal, and independent branches of

government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). The Clause "insure[s] that the legislative function the Constitution allocates to Congress may be performed independently," *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975), and that the "wisdom of congressional approach or methodology is not open to judicial veto," *id.* at 509.

The Speech or Debate Clause privilege is "secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office, without fear of prosecutions, civil or criminal." *Coffin v. Coffin*, 4 Mass. (1 Tyng) 1, 27 (1808).[7] The Clause ensures that legislators are not diverted from their constitutional duties. *Eastland*, 421 U.S. at 503. The Speech or Debate Clause privilege "is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. . . . [H]e cannot be deprived [of the privilege] . . . by an act of the legislature." *Coffin*, 4 Mass. (1 Tyng) at 27; see also *United States v. Brewster*, 408 U.S. 501, 507 (1972) (the purpose of the privilege is "to protect the integrity of the legislative process by insuring the independence of *individual legislators*" (emphasis added)).

"Without exception, [the Court's] cases have read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501; see, *e.g.*, *Brewster*, 408 U.S. at 516

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[7] This Court has stated that *Coffin* "is, perhaps, the most authoritative case in this country on the construction of the provision [Speech or Debate Clause] in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution of the United States, is of much weight." *Kilbourn*, 103 U.S. at 204.

("In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers."); *Gravel*, 408 U.S. at 618 ("Rather than giving the Clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from . . . judicial oversight that realistically threatens to control his conduct as a legislator."); see also *Coffin*, 4 Mass. (1 Tyng) at 27 (The Clause "ought not to be construed strictly, but liberally, that the full design of it may be answered. . . . [The privilege] secur[es] to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office.").

It is well settled that the Speech or Debate Clause protects all legislative acts, not just speeches and debates on the floors and at committee hearings of the House and Senate. This Court has repeatedly held that the Clause protects *all* acts that are within the "legitimate legislative sphere." *Eastland*, 421 U.S. at 503; see also *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973); *Gravel*, 408 U.S. at 624-25. An act is within the legitimate legislative sphere when it is "part of the legislative process—the *due* functioning of the process." *Brewster*, 408 U.S. at 516.

Speech or Debate Clause immunity is absolute:

> [W]hether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled. We reaffirm that once it is determined that Members are acting within the

> "legitimate legislative sphere" the Speech or Debate Clause is an absolute bar to interference.

Eastland, 421 U.S at 503 (citing *McMillan*, 412 U.S. at 314).

Further, the Speech or Debate Clause protects not only "against inquiry into acts that occur in the regular course of the legislative process" but also against inquiry "into the motivation for those acts." *Brewster*, 408 U.S. at 525. A privilege is no longer absolute if the actor must explain his motive. See *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The privilege would be of little value if [legislators] could be subjected . . . to the hazard of a judgment against them based upon a jury's speculation as to motives."); *id.* ("The claim of an unworthy purpose does not destroy the privilege. . . . [I]t [is] not consonant with our scheme of government for a court to inquire into the motives of legislators . . . ."). All acts, no matter how reprehensible, that are within the legislative sphere are beyond court review. *Eastland*, 421 U.S. at 510.

Also, the Speech or Debate Clause protects Members "'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Id.* at 503 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)). Thus, the Clause is not merely an evidentiary privilege. Acts within the legislative sphere "may not serve as a predicate for a suit." *McMillan*, 412 U.S. at 318. Court adjudication is permissible only if the case "does not rely on legislative acts or the motivation for legislative acts." *Brewster*, 408 U.S. at 512. The Clause precludes any person from advancing his case by "[r]evealing information as to a legislative act," *Helstoski*, 442 U.S. at 490, or by revealing communications between a Member and his aide regarding a legislative act, *Gravel*, 408 U.S. at 628-29. Also, a Member cannot be made to answer --

in terms of defending himself -- for a legislative act or his motivation for such an act. See *id.* at 616.

A. Courts Cannot Adjudicate CAA Cases Brought By Employees Whose Job Duties Are Part Of The Due Functioning Of The Legislative Process

The Speech or Debate Clause bars court adjudication of CAA discrimination claims brought by employees whose job duties are part of the due functioning of the legislative process because such claims are predicated or rely on, or would require questioning or would reveal information about, a legislative act or the motive for it, or would require the Member to answer -- in terms of defending himself -- for a legislative act or the motivation for such an act.

This Court has recognized that legislative acts are performed not only by Members but also by the Members' aides and assistants:

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181 (1966) —will inevitably be diminished and frustrated.

Gravel, 408 U.S. at 616-17; see also *Davis v. Passman*, 442 U.S. 228, 254 (1979) (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("A Congressman simply cannot perform his constitutional duties effectively, or serve his constituents properly, unless he is supported by a staff in which he has total confidence."); *McMillan*, 412 U.S. at 317-18 (affirmed dismissal of case as to aides and congressional consultants on Speech or Debate Clause immunity basis because case against them was predicated on their legislative acts; dismissal of case against congressional functionaries proper if, on remand, evidence shows that their actions were within the legislative sphere), *on remand*, *Doe v. McMillan*, 566 F.2d 713, 715, 718 (D.C. Cir. 1977) (case against congressional functionaries dismissed on Speech or Debate Clause immunity basis). Thus, the job duties of a Member's alter ego are legislative acts.

Given that a Member cannot perform his constitutional duties without the day-to-day assistance of his aides, who are his alter egos, it follows that a Member cannot effectively perform his constitutional duties or represent his constituents properly unless the Member manages his alter egos. To make his legislative process function, a Member must hire, assign duties and locations to, evaluate the performance of, promote, demote, discipline, fire and otherwise manage his alter egos. When the Member takes such personnel actions with respect to employees whose job duties are part of the due functioning of the legislative process, the Member's personnel actions are also part of the due functioning of the legislative process: they are actions the Member takes to make his legislative process function. The Member is not just hiring and managing an employee; the Member is choosing his "second self" and is determining what his second self will do and how he will do it. See *Passman*, 442 U.S. at 254 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting) (stating that a Member's

employment decisions "are bound up with the conduct of his duties"). Because those personnel actions are part of the due functioning of the legislative process, the Speech or Debate Clause provides absolute immunity for them, irrespective of the Member's motive for taking such actions.[8] See *Eastland*, 421 U.S. at 510; *Tenney*, 341 U.S. at 377.

Employment discrimination claims that challenge a Member's decision to terminate an employee whose job duties are part of the due functioning of the legislative process cannot be adjudicated without violating the Member's Speech or Debate Clause privilege because such claims are predicated on a legislative act: the termination. Furthermore, the case cannot be adjudicated without "questioning" the termination, *Gravel*, 408 U.S. at 628-29, and the employee cannot advance his case without "revealing information as to a legislative act," the termination, *Helstoski*, 442 U.S. at 490. Cf. *Nixon v. Fitzgerald*, 457 U.S. 731, 762 (1982) (Burger, C.J., concurring) ("Absent absolute immunity, . . . each suit . . . would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the

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[8] The Dayton Office's proposed test -- whether the employee's job duties are part of the due functioning of the legislative process -- represents a minor modification of the test articulated in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), which was rejected by the en banc D.C. Circuit below. To the extent the *Browning* test, which stated that a legislative act is one that is "*directly related to the due functioning of the legislative process*," *id.* at 929, is broader than *Brewster*'s test that a legislative act must be "part of . . . the *due* functioning of the [legislative] process," *Brewster*, 408 U.S. at 516, the *Browning* test is too broad. Furthermore, the *Browning* court apparently excluded court adjudication of all employment cases brought by employees whose job duties are directly related to the due functioning of the legislative process, while the test urged herein allows for court adjudication of some CAA employment claims brought by employees whose job duties are part of the due functioning of the legislative process.

information on which it was based, and who supplied the information."). In addition, adjudicating a discrimination claim would require the Member to answer -- in terms of defending himself -- for the termination and his motive for the termination. See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

Moreover, an allowable remedy under the CAA for an employee who prevails on his discrimination claim is reinstatement to his former job.[9] See 42 U.S.C. § 2000e-5(g)(1) (2000) ("the court may . . . order . . . reinstatement"), as incorporated in 2 U.S.C. § 1311(b)(1)(A). It is difficult to imagine a more egregious intrusion by the Judicial Branch into a Member's sphere of constitutional duties than allowing a court to determine that a particular person will be the Member's alter ego, notwithstanding the Member's assessment that the person's employment should be terminated. Such intrusion would contravene this Court's guidance that "[t]he wisdom of congressional approach or methodology is not open to judicial veto," *Eastland*, 421 U.S. at 509, and that the Clause "insure[s] that the legislative function the Constitution allocates to Congress may be performed independently," *id.* at 502. Examples of other CAA remedies that raise serious separation of powers concerns include promotion, geographic reassignment, and change in legislative job responsibilities.[10]

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[9] Given the cessation of the Dayton Office, reinstatement is not an option in this case.

[10] For example: (i) a court could determine that employee X, rather than employee Y, should have been promoted to the position of legislative director, and the court could order the employee's promotion; or (ii) a Member could determine that an employee who had an expertise in water rights should be relocated to another area of the state where the majority of constituents having water rights concerns reside, and a court could determine that the Member had relocated the employee for discriminatory

All of these remedies would interfere with the Member's independent judgment as to how to carry out his constitutional duties and would deny voters the right to determine who will make legislative decisions for them.[11]

Furthermore, such judicial intrusion cannot be circumvented by merely disallowing certain remedies. The immunity protects a Member "not only from the consequences of litigation's results but also from the burden of defending [himself]." *Dombrowski*, 387 U.S. at 85. "[A] private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks . . . and legislative independence is imperiled." *Eastland*, 421 U.S. at 503.

This is not to say that all CAA discrimination claims by employees whose job duties are part of the due functioning of the legislative process would be barred by the Speech or Debate Clause. For example, suppose that a Member creates a sexually hostile work environment and a female employee whose job duties are part of the due functioning of the legislative process files a CAA suit in federal court. Groping employees and telling lewd jokes are not legislative acts because they are objectively "beyond the apparent needs of the '*due* functioning of the [legislative] process.'" *McMillan*, 412 U.S. at 317

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reasons and could order the return of the employee to her original work station; or (iii) a court could determine that a legislative aide had been discriminatorily denied being assigned to a particularly desirable legislative issue and could order reassignment.

[11] In addition, although not applicable in this case due to the cessation of the Dayton Office, such remedies could raise political question problems in other CAA cases due to a lack of judicially manageable standards for determining such remedies. See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

(quoting *Brewster*, 408 U.S. at 516) (alteration in original).[12] Therefore, such a claim would not be predicated on or in most cases question a legislative act. Rather, a court's determination in a hostile work environment case focuses on "whether an environment is sufficiently hostile or abusive," *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998), which requires consideration of such things as the "'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance,'" *id.* at 787-88 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)). Accordingly, the Speech or Debate Clause would not bar federal court adjudication of such a claim.

Even if this Court were to determine that personnel actions against alter egos are not, in and of themselves, legislative acts, the Speech or Debate Clause would preclude adjudication of a CAA case if the challenged personnel action was related to an employee's performance of those job duties that are legislative acts. For example, if an employee alleged discriminatory discharge and the Member asserted that he had terminated the employee because he had failed to perform his legislative duties to the Member's satisfaction, then the case could not be adjudicated without questioning and revealing information about legislative acts, i.e., the employee's legislative job duties.

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[12] In contrast, whether a discriminatory termination is "beyond the apparent needs of the due functioning of the legislative process" is a question a court could never reach when the employee's duties are part of the due functioning of the legislative process. The termination of such an employee is, in and of itself, a legislative act, and, on that basis alone, the Speech or Debate Clause bars adjudication of any case that is predicated on or would question the termination. A court cannot question the motive for the termination. See *Brewster*, 408 U.S. at 525. Further, "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney*, 341 U.S. at 377.

To preclude adjudication of such a case in violation of the Speech or Debate Clause, a Member would have to submit an affidavit to a court stating that the employee had been discharged for poor performance of a legislative act, but the Member could not be required to reveal details about the termination that would reveal a legislative act; rather, a court would have to accept the Member's statement as true. Although this procedure is at once too easy and too hard (because such reasons for termination can be concocted, but in establishing the reason the Member cannot be made to reveal a legislative act), it is the only procedure that would preclude judicial intrusion into the legislative sphere.

In summary, when an employee whose job duties are part of the due functioning of the legislative process brings a CAA claim, in most instances the Speech or Debate Clause will bar court adjudication of the claim because the personnel action itself is a legislative act, and, therefore, the claim will be predicated on a legislative act and/or will require questioning about or will reveal information of a legislative act or the motive for that legislative act, and/or will require a Member to answer -- in terms of defending himself -- for his legislative act and/or his motive. Furthermore, even if this Court were to determine that a personnel action against such an employee is not, in and of itself, a legislative act, the adjudication of any claim that relies on or questions an employee's legislative duties would still violate the Speech or Debate Clause.

B. This Court Has Held That The President, Who Has No Textual Immunity, Is Absolutely Protected For His Personnel Actions; It Would Be Incongruous To Determine That Members Of Congress Are Less Protected Than The President For Their Personnel Actions

The closest this Court has come to addressing the issue of whether the Speech or Debate Clause precludes federal court adjudication of congressional personnel actions is *Davis v. Passman*, 442 U.S. 228 (1979). *Passman* involved the allegedly discriminatory termination of a female employee of U.S. Congressman Otto Passman. While pretermitting whether the Speech or Debate Clause shielded Representative Passman's conduct, this Court "h[e]ld that judicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause." *Id.* at 235 n.11. Two dissenting Justices in *Passman* thought that the Speech or Debate Clause issue was "far from frivolous" and could have been dispositive of the case. *Id.* at 251 (Stewart, J., joined by Rehnquist, J., dissenting).

Although this Court has not addressed the issue of whether the Speech or Debate Clause precludes federal court adjudication of congressional personnel actions, this Court's decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), supports the soundness of the Dayton Office's test for Speech or Debate Clause immunity. In *Fitzgerald*, the Court addressed the issue of whether the President was absolutely immune for personnel actions taken against a management analyst employed in the Department of the Air Force. The management analyst, Fitzgerald, had given damaging testimony before Congress about cost overruns at the Defense Department. *Id.* at 734 n.1. Fitzgerald's employment was subsequently terminated, and evidence revealed that President Nixon had been involved in

the termination decision. *Id.* at 733, 737. Fitzgerald sued President Nixon and other Executive Branch officials claiming that the termination was in retaliation for Fitzgerald's damaging, congressional testimony. President Nixon, who was no longer in office, asserted absolute immunity. The district court denied the President's claim of absolute immunity, *id.* at 740-41, and the appellate court summarily dismissed the President's collateral appeal for lack of jurisdiction, *id.* at 741, 743. Reversing the lower court's immunity decision, this Court held that although the President has no expressly stated, absolute immunity under the Constitution as do members of Congress, *id.* at 750 & n.31, his absolute immunity can be inferred due to "history" and "constitutional tradition" and the President's "unique position in the constitutional scheme," *id.* at 749. This Court further held that the basis of this inferred, absolute immunity is the separation of powers. *Id.* The President's immunity extends to any action the President takes within his "sphere of responsibility." *Id.* at 760-61 (Burger, C.J., concurring); see also *id.* at 749, 754 (majority opinion) (President has absolute immunity from claims "predicated on his official acts."). The President's constitutional sphere of responsibility includes being Commander in Chief of the Armed Forces. See *id.* at 757; see also U.S. CONST. art. II, § 2. That responsibility, this Court held, "must include the authority to prescribe reorganizations and [employee terminations]." *Fitzgerald*, 457 U.S. at 757. The Court concluded, therefore, that a court could not second guess the President's decision to fire staff who fulfilled duties within the President's sphere of responsibility, even when those staff were as far removed from the President's immediate sphere as was Fitzgerald, a management analyst working at the Pentagon. *Id.* (Fitzgerald's termination "lay well within the outer perimeter of [the President's] authority."). As Chief Justice Burger observed:

> Absent absolute immunity . . . each suit . . . would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information. Such scrutiny of day-to-day decisions of the Executive Branch would be bound to occur . . . . [T]he need to prevent large-scale invasion of the Executive function by the Judiciary far outweighs the need to vindicate the private claims.

Id. at 762 (Burger, C.J., concurring).

Fitzgerald supports the soundness of the Dayton Office's test for immunity because Speech or Debate Clause immunity, like the President's inferred, absolute immunity, is grounded in separation of powers principles. Compare *id.* at 749 (majority opinion) (the President's absolute immunity is "rooted in the constitutional tradition of the separation of powers"), with *United States v. Gillock*, 445 U.S. 360, 370 (1980) (the Speech or Debate Clause "rest[s] solely on the separation of powers doctrine"). Indeed, in his concurrence in *Fitzgerald*, Chief Justice Burger acknowledged that the Court was extending to the President the protections the Speech or Debate Clause affords Members. See *Fitzgerald*, 457 U.S. at 762 (Burger, C.J., concurring) ("We have decided that in a similar sense Members of both Houses of Congress—and their aides—must be totally free from judicial scrutiny for legislative acts."). Further, the purpose of the President's inferred, absolute immunity and the Members' express constitutional immunity is the same -- to allow independent functioning of the coequal branches of government within their respective spheres of constitutional responsibilities. Compare *Helstoski*, 442 U.S. at 491 (purpose of Speech or Debate Clause is to prevent "intrusion by the . . . Judiciary into the sphere of protected

legislative activities"), with *Fitzgerald*, 457 U.S. at 761 (Burger, C.J., concurring) (purpose of President's inferred immunity is to prevent "judicial intervention" into the President's "sphere of responsibility"). Congress's "sphere of responsibility" includes all federal legislative powers. See U.S. CONST. art. I, § 1. Just as the separation of powers prohibits judicial interference with the President's management of an employee whose duties are within the sphere of the President's constitutional duties, so too the separation of powers prohibits judicial interference with a Member's management of an employee whose duties are within the sphere of the Member's constitutional duties.[13]

Neither Article II nor Article III of the Constitution, delineating the powers of the Executive Branch and Judicial Branch, respectively, grants absolute immunity. Thus, the text of the Constitution affords greater independence to the Legislative Branch than to any other branch of government. "It is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess." *Tenney*, 341 U.S. at 375. It would be incongruous for the President to have greater

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[13] Preserving judicial independence is the primary reason the federal judiciary is subject to virtually no federal employment laws. CAA § 505 required the Judicial Conference to report to Congress whether Judicial Branch employees should be governed by the 11 federal employment laws that are the subject of the CAA and to report "any recommendations the Judicial Conference may have for legislation to provide to employees of the judicial branch the rights, protections, and procedures . . . , including administrative and judicial relief, that are comparable to those available to employees of the legislative branch [under the CAA]." 2 U.S.C. § 1434. The Judicial Conference concluded that, to preserve the independence of the Judiciary, such laws should not apply to the judicial branch. See JUDICIAL CONFERENCE OF THE U.S., STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, at 2, 4 (Dec. 1996).

protection from Judicial Branch intrusion in employment decisions than do members of Congress.[14]

C. The D.C. Circuit Should Have Ordered The District Court To Dismiss This Case Because It Cannot Be Adjudicated Without Violating The Speech Or Debate Clause

The D.C. Circuit erred in holding that the district court is not barred from adjudicating this case. Hanson's job duties are part of the due functioning of the legislative process, and, as discussed in section III.A., *supra*, his case is predicated on a legislative act, his termination.

In support of its motion to dismiss in the district court, the Dayton Office submitted evidence demonstrating that Hanson's job duties were part of the due functioning of the legislative process -- that Hanson was an alter ego of Senator Dayton.

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[14] Circuit Judge Randolph found this Court's *Fitzgerald* decision inapposite to this case because the "President's immunity is based on his 'unique position in the constitutional scheme' and the 'singular importance of the President's duties.'" J.S. App. 19a (internal citations omitted). As an initial matter, "[i]n relation to his or her constituents, and in the performance of constitutionally defined functions, each Member of the House or Senate occupies a position in the Legislative Branch comparable to that of the President in the Executive Branch." *Passman*, 442 U.S. at 250 (Burger, C.J., joined by Powell, J., and Rehnquist, J., dissenting). In any event, while the Court in *Fitzgerald* cited the President's "unique position in the constitutional scheme," 457 U.S. at 749, and the "singular importance of the President's duties," *id.* at 751, to justify the Court's inference that the President was entitled to an absolute immunity for his official acts, the Court did so because the President has no textual, absolute immunity. It does not follow that those who do not hold a "unique" position in our constitutional scheme are not protected by an absolute immunity. Members of Congress are entitled to absolute immunity because the Constitution expressly grants it to them; inferring an immunity for them is unnecessary.

Legislating involves a chain of acts beginning at least as early as field work by a staff employee and continuing through committee hearings and voting. Hanson regularly met with constituents, community groups and community leaders to learn, among other things, their concerns and priorities in the healthcare and law enforcement areas, their suggestions regarding legislation Senator Dayton should introduce, and their opinions about whether the Senator should support or oppose certain legislation. J.S. App. 67a-68a ¶¶ 3, 6. Hanson acted as the Senator's eyes and ears in these meetings. Based on the information he gathered, Hanson identified and briefed Senator Dayton about opportunities for legislative initiatives. J.S. App. 68a-71a ¶¶ 6-8; 74a-81a. For example, he identified opportunities for legislative initiatives with respect to raising the mandatory retirement age for federal law enforcement officials, obtaining medicare payments for ambulances, and providing coverage for prescription drugs for disabled Medicare recipients. J.S. App. 68a-71a ¶¶ 7-8; 76a; 80a. Such job duties are part of the due functioning of the legislative process because "'[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)). Hanson also developed and advised Senator Dayton of legislative solutions to constituent problems, J.S. App. 71a-73a ¶¶ 9-13; 82a-89a, planned a committee hearing, selected topics and witnesses for the hearing, and developed questions for those witnesses, J.S. App. 73a ¶ 14. These acts are also part of the due functioning of the legislative process. See *Gravel*, 408 U.S. at 615, 628-29 (Speech or Debate Clause prohibits questioning concerning the conduct of the Senator or his aides at subcommittee hearing or concerning communications between the Senator and his aides related to the hearing or any other legislative act). Accordingly,

Hanson's job duties were part of the due functioning of the legislative process.

As discussed in Section III.A, *supra*, when a Member takes a personnel action against an employee whose job duties are part of the due functioning of the legislative process, the personnel actions are legislative acts. Therefore, a court cannot adjudicate Hanson's discrimination claims because they are predicated on a legislative act: his termination. Moreover, court adjudication of Hanson's discrimination claims would reveal information about a legislative act, the termination, or the motivation for such an act, or would reveal communications between Senator Dayton and Hanson about the termination. Furthermore, defense of the termination claims would require Senator Dayton to answer -- in terms of defending himself -- for the termination and his motivation for the termination. That is precisely the judicial interference with legislative independence the Speech or Debate Clause prohibits.

In addition, the Speech or Debate Clause bars judicial adjudication of Hanson's claim for overtime payments. Hanson claims that "his job duties did not qualify him as an employee who was exempt from overtime payments under the Fair Labor Standards Act." J.A. 12 ¶ 6. Where an employee, like Hanson, whose job duties are part of the due functioning of the legislative process asserts a claim disputing whether he is exempt from overtime payments, the case cannot be advanced without examining in detail the employee's duties, which is questioning about legislative acts because the job duties are legislative acts. Determining whether that employee is employed in a bona fide executive, administrative or professional capacity, see 29 U.S.C. § 213 (as incorporated by 2 U.S.C. §§ 1313, 1384(a)(1); OC Regulations S541.1-S541.3 (1996), http://www.compliance.gov/employeerights/regs/FLSA-Senate.pdf, and therefore is exempt from overtime

payments requires examining the employee's day-to-day duties, what the employee's primary duty is, the extent to which the employee exercises discretion and independent judgment, and, at least in the case of the administrative exemption, whether the employee performs work of substantial importance to the management or operation of the office. Accordingly, the Speech or Debate Clause bars judicial adjudication of such a claim.

The D.C. Circuit erred therefore in not ordering the district court to dismiss Hanson's case. Circuit Judge Randolph, joined by Chief Judge Ginsburg and Circuit Judges Henderson and Tatel, concluded that the Speech or Debate Clause does not present a jurisdictional bar to Hanson's suit because "it does not appear from . . . Hanson's complaint[] that [Hanson] sought to predicate liability on protected conduct," i.e., on acts within the legislative sphere. J.S. App. 20a. Circuit Judge Rogers similarly found that the Speech or Debate Clause does not bar Hanson's suit because "an examination of the complaint[] makes clear that [Hanson does not need to] rely on legislative acts to make a *prima facie* case." J.S. App. 28a (Rogers, J., concurring in part and in the judgment). The D.C. Circuit erred by limiting its analysis to the face of the complaint. Where the defendant moves for dismissal of CAA claims for lack of jurisdiction on the basis of Speech or Debate Clause immunity and supports its motion with a declaration or other relevant material, as the Dayton Office did, the court should consider the evidentiary material submitted, not just the complaint, in determining whether the Clause bars the court's jurisdiction. Cf. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 184 (1936) (A court may consider materials outside the pleadings to satisfy itself that it has subject matter jurisdiction of a case.). "The entitlement is an *immunity from suit* . . . [that] is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). In most

civil cases, the complaint need not even set forth a prima facie case. See *Swierkiewicz v. Sorema*, 534 U.S. 506, 515 (2002). For example, in a discrimination case, the D.C. Circuit explained that "'[b]ecause racial discrimination in employment is "a claim upon which relief can be granted,".... "I was turned down for a job because of my race" is all a complaint has to say' to survive a motion to dismiss under Rule 12(b)(6)." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1115 (D.C. Cir. 2000) (quoting *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998)). Finding the complaint to be conclusive on the issue of absolute immunity would eviscerate the protections of the Speech or Debate Clause. See *Tenney*, 341 U.S. at 377 ("The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader . . . .").

The D.C. Circuit also erred by concluding that the Speech or Debate Clause's jurisdictional bar is limited to those cases that are predicated on a legislative act. Even if a case is not predicated on a legislative act, the Clause bars court adjudication of the case if it relies on or requires inquiry into a legislative act or the motivation for that act, or requires the Member to answer -- in terms of defending himself -- for a legislative act.

D. Circuit Judges Brown, Sentelle And Griffith Erred In Concluding That The Speech Or Debate Clause Acts As A Jurisdictional Bar Only When The Defendant Is A Member Or His Aide

Circuit Judge Brown, with whom Circuit Judges Sentelle and Griffith joined, concurring in the judgment, erroneously concluded that the Speech or Debate Clause's jurisdictional bar is inapplicable to CAA actions because the defendant in such suits is not the Member or the Member's alter ego but rather an

"employing office." J.S. App. 45a-53a. The Court has never held that acts within the legislative sphere can form the predicate of a suit or can be questioned or revealed as long as the Member or his aide is not the named defendant. Rather, this Court has consistently held that disclosure and questioning of legislative acts violates the Clause -- period. Indeed, this Court has determined that the Speech or Debate Clause bars adjudication of cases brought against congressional committees, which are "employing offices" under the CAA: "We conclude that the actions of the Senate Subcommittee, the individual Senators, and the Chief Counsel are protected by the Speech or Debate Clause . . . and are therefore immune from judicial interference." *Eastland*, 421 U.S. at 501; cf. *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 733-34 (1980) (observing that if state legislature, rather than state supreme court, had passed the state's Bar Code and "suit had been brought against the legislature, its committees or members," absolute legislative immunity would bar the suit); *Tenney*, 341 U.S. at 379 (legislative committees can invoke legislative privilege). Accordingly, the conclusion of Circuit Judges Brown, Sentelle and Griffith is inconsistent with this Court's Speech or Debate Clause jurisprudence.

Regardless of who the defendant is, allowing Hanson's suit to proceed would violate the Speech or Debate Clause by allowing intrusion of the judiciary into the legislative sphere, including referencing past legislative acts, judging a Member's motives as to such acts, and imperiling legislative independence. See, *e.g.*, *Helstoski*, 442 U.S. at 490; *Eastland*, 421 U.S. at 502-503; *Brewster*, 408 U.S. at 512.

E. The "Functional Approach" To Immunity Questions, As Articulated In The Court's *Forrester* Decision, Does Not Apply To The Speech Or Debate Clause Immunity Analysis

The D.C. Circuit erroneously relied on *Forrester v. White*, 484 U.S. 219 (1988), in rejecting the Dayton Office's claim of immunity. See J.S. App. 9a-10a. In *Forrester*, a female probation officer brought an action against her employer, a state judge, who had demoted and then discharged her. *Forrester*, 484 U.S. at 220-21. The plaintiff alleged, *inter alia*, that the judge had discharged her due to her gender, in violation of 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964. *Id.* at 221. The district court granted the defendant judge's motion for summary judgment on the ground that he was entitled to judicial immunity from civil damages suits. *Id.* at 222. The plaintiff appealed, and the Court of Appeals for the Seventh Circuit affirmed. *Id.* Reversing and remanding, this Court held that when determining whether a state actor is protected by common law official immunity, a court must examine the type of action taken by the official; if the action is merely administrative in nature, then immunity is not extended to the state actor. *Id.* at 227-29. The Court concluded that the state judge's demotion and termination of the employee were merely administrative acts, not "judicial acts," and, therefore, no immunity applied. *Id.* at 229-30.

The D.C. Circuit's reliance on *Forrester* was misplaced for several reasons. First, *Forrester* addressed common law immunity applicable to a state judge, not Speech or Debate

Clause immunity.[15] The two immunities are quite different from each other. "[J]udicial immunity affords less protection than legislative immunity under the Speech or Debate Clause." *Eades v. Sterlinske*, 810 F.2d 723, 725 n.1 (7th Cir. 1987) (citing *Dennis v. Sparks*, 449 U.S. 24, 30 (1980)). Furthermore, Speech or Debate Clause immunity protects the separation of powers among independent, coequal branches of the federal government. See *Gillock*, 445 U.S. at 369-70. The separation of powers doctrine does not apply to the federal judiciary's relationship to the states because the federal judiciary and the states are not independent, coequal branches of government. As the Court explained in *Gillock*:

> [T]he Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power. Thus, under our federal structure, we do not have the struggles for power between the federal and state systems such as inspired the need for the Speech or Debate Clause . . . .
>
> . . . [F]ederal interference in the state legislative process is not on the same constitutional footing with

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[15] In her petition for writ of certiorari, Ms. Forrester argued that a split existed between the circuits. She identified one side of the split as the Seventh Circuit's decision in *Forrester* and the D.C. Circuit's *Browning* decision, which had held, respectively, that personnel actions of a state judge and of a federal legislator were protected by an absolute immunity. She identified the other side of the split as *Goodwin v. Circuit Court*, 729 F.2d 541 (8th Cir. 1984), and *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), which had held, respectively, that personnel actions of a state judge and of a federal legislator were *not* protected by an absolute immunity. In granting certiorari, this Court identified the relevant circuit split as being established by only *Forrester* and *Goodwin*, the two cases involving state actors protected by common law official immunity. See *Forrester*, 484 U.S. at 222-23.

> the interference of one branch of the Federal Government in the affairs of a coequal branch.

445 U.S. at 370. Thus, common law immunity does not preclude the federal judiciary from intruding into a state actor's sphere of responsibility and questioning the state actor about matters at the heart of that sphere. Compare *Gillock*, 445 U.S. at 366-67, 373 (holding that in criminal actions common law immunity does not protect a state legislator's participation in committee hearings, floor speeches or votes, but recognizing that the Speech or Debate Clause does protect a federal legislator for those same activities), with *Eastland*, 421 U.S. at 502 (Speech or Debate "Clause provides protection against civil as well as criminal actions . . . .").

Second, in *Forrester*, the Court stated that the functional approach is inapplicable when Speech or Debate Clause immunity is involved. *Forrester*, 484 U.S. at 224 ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions *other than those that have been decided by express constitutional or statutory enactment*.") (emphasis added).

Third, in *Forrester*, this Court found that a state judge's administrative acts, even administrative decisions that are "essential to the very functioning of the courts," are not protected by judicial immunity. *Id.* at 228. In contrast, this Court has held that Speech or Debate Clause immunity covers any act that is part of "the *due* functioning of the [legislative] process," *Brewster*, 408 U.S. at 516, and that the judicial branch should not possess "directly or indirectly, an overruling influence over [legislators] in the administration of their . . . powers," *Johnson*, 383 U.S. at 178 (quoting THE FEDERALIST NO. 48 (James Madison) (Cooke ed., 1788)). Thus, while judicial immunity does not prohibit courts from interfering with

the functioning of the courts, Speech or Debate Clause immunity does prohibit courts from interfering, directly or indirectly, with the due functioning of the legislative process.

Finally, this Court has never suggested, let alone held, that Speech or Debate Clause immunity does not shield administrative acts that are within the legislative sphere. Rather, the Court has consistently held that *all* acts that are within the legitimate legislative sphere are protected. See *Eastland*, 421 U.S. at 503; *McMillan*, 412 U.S. at 312-13; *Gravel*, 408 U.S. at 624-25. Indeed, in *McMillan*, the Court determined that the acts of congressional functionaries -- printing documents and sending them to such places as law firms -- are protected by the Speech or Debate Clause if those acts are within the legitimate legislative needs of Congress.[16] *McMillan*, 412 U.S. at 317. Although printing and mailing are administrative acts, that fact did not enter the Court's analysis as to whether those acts were protected; rather, the Court focused solely on whether any part of the printing and public distribution of documents was outside the legislative sphere. *Id.* at 318, 324. The Speech or Debate Clause immunity governs *all* acts, which by definition includes administrative acts, that are within the legislative sphere.

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[16] Because the record before the Court in *McMillan* provided "little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity, ha[d] been exceeded," the Court remanded the case for a determination of whether the functionaries' administrative acts were within the legitimate legislative sphere. *McMillan*, 412 U.S. at 324-25. On remand, the district court found that the functionaries' acts, including printing and mailing documents to law firm libraries, were within the legitimate legislative sphere and dismissed the complaint as to them based on Speech or Debate Clause immunity. *Doe v. McMillan*, 374 F. Supp. 1313, 1316 (D.D.C. 1974). The D.C. Circuit affirmed. *Doe v. McMillan*, 566 F.2d at 715, 718.

CONCLUSION

The Court should accept jurisdiction of this appeal pursuant to CAA § 412. If the Court concludes that CAA § 412 does not provide a basis for appellate jurisdiction, then the Court should treat the Dayton Office's Jurisdictional Statement as a petition for a writ of certiorari and should grant the petition.

Because the Dayton Office no longer exists and there is neither a successor defendant nor a statute providing for non-abatement of this litigation, the Court should dismiss this case as moot.

If the Court does not dismiss this case as moot, the Court should reverse the judgment of the court of appeals and should remand with instructions to dismiss on the ground that the Speech or Debate Clause is a jurisdictional bar to this action.

Respectfully submitted.

JEAN M. MANNING
Senate Chief Counsel for Employment
Counsel of Record

TOBY R. HYMAN
CLAUDIA A. KOSTEL
DAWN BENNETT-INGOLD

OFFICE OF SENATE CHIEF COUNSEL
FOR EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
Phone (202) 224-5424
Facsimile (202) 228-2557

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APPENDIX

APPENDIX

Facilities and Furnishings, Paper and Mailing Allowances

Office Space

This section provides information on Senators' Washington, D.C., office space, and home state and mobile office space.

Washington, D.C., Office

* * * * *

Assignment of Washington, D.C., Office Space Based on Seniority

* * * * *

Vacation of Office Space

Senators not serving in the succeeding Congress must vacate offices on term expiration. For guidance in closing an office, as well as for procedures if office vacation results from a Senator's death or resignation, see **"Appendix I-C: Closing a Senator's Office".**

* * * * *

Flag Operations

The Senate Stationery Room and Printing, Graphics and Direct Mail (PG&DM) assist Senate offices with the processing of constituent requests to have American flags flown over the United States Capitol. Constituents send Member offices flag requests along with a check covering the cost of the type of flag they wish to order. Total cost includes the flag price, shipping fees, and the flag flying and certification fee. Prices for various types of flags can be obtained from the Stationery Room.

Important! Constituents must make checks payable to the Keeper of the Stationery.

The following section describes how a Senate staffer obtains a flag and has it flown over the Capitol building after the Member office receives the flag request.

How To Obtain and Fly a Flag

1. Senate office receives flag order form and check or money order from constituent.

2. Senate office completes Flag Request Form and prepares a mailing label. Flag Request Forms are obtained from PG&DM and include the following information:

    - name of member office that received the flag request

- name of constituent or organization for whom the flag will be flown
- type of flag being requested
- message that will be printed on the flag certificate
- expected date the flag is to be flown
- instruction for disposition of the flag after it is flown

3. Senate office writes the Senator's name on check or money order and purchases flag -- along with necessary cards that indicate flying/certification and shipping charges have been paid -- from the Senate Stationery Room.

4. Senate office takes flag, Flag Request Form and flying/certification and shipping cards to the Packaging and Flags section of PG&DM (SDG-82).

5. PG&DM personnel deliver the flag to the Architect of the Capitol Flag Office in the Capitol where staff fly the flag and create a certificate.

6. PG&DM personnel will either deliver the finished flag to the Senate office or ship it directly to the constituent.

7. If a constituent does not request that a flag be flown on a specific date, Senate offices can purchase flags that have been pre-flown over the Capitol. These flags also are purchased in the Senate Stationery Room and cost the same as flags that are to be flown on a particular date. Pre-flown flags contain a certificate that certifies the flag was flown over the U.S. Capitol. The Member office can elect to prepare a second certificate that includes the constituent's name and references an occasion. Senate office staff prepares a mailing label and deliver the pre-flown flag to PG&DM for shipment.

* * * * *

* * * * *

Mass Mailings

PG&DM Printing and Mailing Services processes all mass mailings and Customer Service Records reports Senate offices' postage usage and other costs for mass mailings to the Disbursing Office. Customer Service Records also provides a monthly report of postage records and quarterly report which includes postage and overhead costs for mass mailings to Senate offices. Senate offices should review these reports for accuracy and notify Customer Service Records of discrepancies. Customer Service Records provides monthly Certification of mass mail charges to the Disbursing Office and Senate Offices.

Each Senate office is responsible for reporting mass mailings to the Office of Public Records on a monthly basis.

Appendix I-C: Closing a Senator's Office

Introduction

This appendix (revised in March 2004) highlights information about closing a Senator's office that concerns staff, office expenditures, the disposition of furniture, equipment, and Senatorial records, the use of computer-based systems and services, and the use of the mailing frank. Special reference is also provided to the variations in law and procedure that apply in each of the above-mentioned circumstances.

The following sections provide the four reasons for closing a Senator's office.

I. Expiration of the Regular Term of Office

Term of Office

A Senator's regular term of office officially expires at noon on January 3 of the year in which such term ends.

Note: Although the regular 6-year term is from noon, January 3 to noon, January 3, the 6-year period for pay and allowances, including staff salaries, has been established for accounting purposes as being from the full day of January 3 through the full day of January 2.

Staff

Employees in the office of a Senator who remains in the Senate until the expiration of their regular term of office and who was not a candidate for reelection, remain on the payroll until the *close of business on January 2* of the year in which the Senator's term of office expires, unless terminated sooner.

Pursuant to S. Res 478 (108-1), employees in the office of a Senator who remains in the Senate until the expiration of their regular term of office, will not be serving as a Senator in the next term and was a candidate for reelection, remain on the payroll for a period not to exceed 60 days following the staff member's date of termination or until the staff member becomes otherwise gainfully employed, whichever is earlier. (See section 73 of the *Senate Manual*, 2001 Edition - reprinted at the end of **Appendix I-C: Closing a Senator's Office.)**

Office Expenses

No obligations may be incurred after the last day of the Senator's service.

Franking Privilege

The Senator is entitled to use the mailing frank until the expiration of the 90-day period immediately following the date of leaving office. If the Senator is an appointee whose term has expired, the frank may be used for matters of official business related to the closing of the office.

Travel

All official travel must be completed by the end of the Senator's term of office. Staff relocation to the home state (transfer to another duty station) is not reimbursable regardless of when it occurs.

II. Resignation

* * * * *

* * * * *

Office Accounts

The following office accounts should be reviewed and cleared as quickly as circumstances permit:

- Restaurant (224-5776)
- Recording Studio (224-4977)
- Stationery (224-4771)
- Senators' Official Personnel and Office Expense Account (224-3205)
- Photographic Studio (224-6000)
- Attending Physician (225-5421)
- Library of Congress (707-5441)
- Law Library (707-5079)
- Senate Library (224-7106)

The Disbursing Office is authorized by law to withhold the Senator's and staff's final paychecks if accounts with the Recording Studio, the Senate Restaurant, or the Stationery Room do not reflect a zero balance.

Official Expenditures

The official office expense account portion of the Senators' Official Personnel and Office Expense Account of each Senator is available for expenses incurred up to and including the Senator's last day of service.

Travel Expenses

Expenses for the relocation of employees to the home state or within the state are not reimbursable.

Telephone

Telephone expenses cannot be officially incurred beyond the Senator's last day of service. Contact the Telecom Services of the Sergeant at Arms' office (224-4300) to terminate telephone service in the Washington, DC and home state office(s).

Subscriptions

All subscriptions should be canceled by the Senator's office. Yearbooks and other annual publications must be canceled along with newspapers and magazines. Refunds received, as the result of the cancellation of a previously paid subscription must be returned to the Disbursing Office. See **"Refunds of Vouchered Expenses" in Chapter IV – Financial Management.**

Stationery

Official purchases may be made at the Stationery Room (224-4771) up to and including the last day of the Senator's service.

Mailing and Delivery Expenses

Unused postage stamps for which reimbursement was received from the Senators' Account should be returned to the Disbursing Office. Shipment of a Senator's official records may be paid from the Senators' Account. Personal items may not be shipped at Senate expense.

* * * * *

* * * * *

The Post Office and the Mail

Regular mail delivery by the Senate Post Office will normally end on the last day of the Senator's service, although different arrangements may be made in the event of the death or resignation of the Senator. The Senate Post Office will forward first class mail to the Senator's forwarding address until January 31 of the year following the Senator's departure. After one year, all mail is returned to sender. It is recommended that the Senator's staff make every effort to remove the Senator's name from mass mailed materials prior to departure by contacting the Senate Post Office (224-5353). If the

Senator's staff does not remove the Senator's name from this mass mail material, the Senate Post Office will remove the Senator's name as of February 1st of the year following the Senator's departure. Second, third, and fourth class mail will be handled by the Senate Post Office as requested.

Mail addressed to Senate staff is not forwarded by the Senate Post Office. Individual staff members are requested to notify correspondents of their new addresses.

* * * * *

Allocated Products and Services

Overview and General Information

This section provides information on the information technology, telecommunications and general office equipment and services that the Committee on Rules and Administration has authorized the Office of the Sergeant at Arms to provide. In most cases these services are provided on an allocation basis – either through economic allocations that allot funds for offices to use to acquire specific items or services or through numeric allocations that allot specific numbers of items to each office. General information on the allocation types and the rules and regulations that apply to all offices is below, followed by information on the specific allocations that apply to each type of office. The Sergeant at Arms Customer Support organization is available to assist offices with making the choices necessary to effectively set up and operate a Senate office.

* * * * *

Economic Allocation Program

The Sergeant at Arms provides computers and associated equipment through the Economic Allocation Program established by the Committee on Rules and Administration. Through this program, offices are given an allotment of funds with which they can purchase standard equipment. If an office desires to have more, or different, equipment than is provided for in the allocations, it may use its official office funds to acquire and maintain that equipment. For more information, see **"Acquisition Procedures"**. All equipment purchased through the Economic Allocation Program is also subject to the restrictions below:

* * * * *

* * * * *

The Constituent Service System Fund

The Sergeant at Arms allocates a certain amount of funds to each Member's office, according to the Member's state population, to pay costs for acquiring, installing, training, and maintaining hardware and software required to support an approved system for constituent correspondence management.

* * * * *

Office Financial Management Activities

Each Senator has the fiduciary responsibility for ensuring that funds spent from his allocation of the Senators' Account are used for official purposes. A bookkeeping system should be used to keep information up to date concerning:

- Current balance available for general expenditures;
- Totals spent in each expenditure category; and
- Monthly and yearly totals to date.

These records should be reconciled periodically with the balances provided by the Disbursing Office reports to ensure that they are in agreement.

Automated System for Voucher Preparation and Financial Management

The Senate provides access to an automated system for voucher preparation and financial management, Web FMIS, which is used by offices, committees, leadership and support offices. The system enables an office to:

- Produce printed vouchers
- Streamline production of vouchers from Expense Summary Reports created via the SAVI system

- Submit vouchers for on-line review by the Disbursing Office staff and for sanctioning by the staff of the Committee on Rules and Administration
- Produce printed travel advance requests
- Track the status of vouchers as they progress through the payment process
- Obtain payment information on any voucher
- Communicate with the Disbursing Office staff regarding changes to vouchers
- Budget the allowance
- Set aside funds for future use
- Create a deposit document to accompany a refund check
- Print a variety of reports showing summary budget-to actual expenditures and detailed voucher level information
- Reconcile Web FMIS records with the monthly report, "Official Personnel and Office Expense Account Summary Report" sent by the Disbursing Office

To use Web FMIS the office manager (or other designated staff) needs a Senate-owned PC with Internet Explorer and Adobe Acrobat Reader (both of which are on the standard Senate template), access to a laser printer, and authority to see voucher information for his or her office.

If the office has this hardware and software, there is no additional cost involved in using Web FMIS. Additional software and training are provided by the Disbursing Office.

* * * * *

Overtime

Overtime hours are tracked and approved by the employing office. Overtime wages to be paid must be certified by the employing office and submitted to the Disbursing Office for payment on a regularly scheduled payday. See the discussion of the Congressional Accountability Act in Chapter I for information about requirements of the Fair Labor Standards Act.

Payment of overtime is authorized by submitting to the Disbursing Office (SH-127) an Overtime Report signed by the Senator, Committee Chairperson, or Officer of the Senate on whose payroll the individual worked during the time the overtime was incurred.

* * * * *

* * * * *

Employment Eligibility Confirmation

Every Senate office is required to comply with the Immigration Reform and Control Act (IRCA) by completing Form I-9 for each new hire and by reviewing certain documents to verify that each new hire is authorized to work in the United States. Form I-9 contains a list of the documents an employing office must review for each employee.

In addition to the above requirement, **every** Senate office **must** register for and participate in the *Basic Pilot Program for Employment Eligibility Confirmation* established by the Department of Homeland Security and the Social Security Administration. This is required by the Illegal Immigration Reform and Immigrant Responsibility Act. Pursuant to that law, each office **must** electronically verify the work authorization of every employee that office hires.

You should contact the Office of the Senate Chief Counsel for Employment (4-5424) if you have any questions regarding these laws.

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Supreme Court, U.S.
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No. 06-618

IN THE

Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,
Appellant,

v.

BRAD HANSON,
Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR APPELLEE

DOUGLAS B. HURON *
RICHARD A. SALZMAN
TAMMANY M. KRAMER
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Counsel for Appellee

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. The sole merits issue in this case is whether Congress can enact legislation giving its own employees the right to go to court to challenge perceived violations of statutes governing employment. This depends in part on whether routine personnel decisions, such as hiring and firing, can fairly be characterized as legislative acts.

2. Was the Office of Senator Mark Dayton entitled to appeal the judgment of the Court of Appeals for the District of Columbia Circuit directly to this Court?

3. Was this case rendered moot by the expiration of the term of office of Senator Dayton?

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STATEMENT

1. *Introduction.* Appellant seeks to undermine the Congressional Accountability Act's key reform—judicial enforcement of workplace claims by congressional employees. According to appellant, the Constitution's Speech or Debate Clause forbids Congress from providing a judicial forum to staffers with legislative duties—the bulk of the employees in Members' offices and on committee staffs—and the very workers whom Members actually supervise. If appellant had its way, the only employees protected by the Act would be the minority of legislative branch workers who have no contact with legislation, such as the waiters in the Senate dining room.

Appellant moved to dismiss this case immediately after the complaint was filed, so there has been no discovery. The sole issue at this early stage is whether Congress can vest Federal courts with jurisdiction to hear employment-related claims brought by its own employees, which turns on whether routine personnel decisions such as hiring and firing are legislative in nature. Appellant says they are, but this view is contrary to the decisions of this Court on the Speech or Debate Clause and similar privileges, and no court of appeals has agreed with appellant's argument. Congress has the authority, consistent with the Clause, to give its own employees access to the judiciary to test their claims of workplace violations.

2. *Proceedings.* Appellee Brad Hanson, a former member of Senator Mark Dayton's staff in Minnesota, sued appellant Office of Senator Dayton in May 2003 under the Congressional Accountability Act (CAA), 2 U.S.C. §§ 1301 *et seq.*, claiming that he was fired in July 2002 immediately after informing the Senator that he needed cardiac surgery. Hanson alleged that his firing violated the Family and Medical Leave Act, 29 U.S.C. §§ 2611 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*,

both of which the CAA makes applicable to congressional offices. 2 U.S.C. §§ 1302(a)(3), (5). Hanson also said that he was denied overtime pay in violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, which likewise applies to Congress under the CAA. 2 U.S.C. § 1302(a)(1).

Senator Dayton's Office filed a motion to dismiss, claiming immunity from suit under the Speech or Debate Clause of the Constitution, Art. 1, § 6, cl. 1. After full briefing, the district court in September 2004 entered a minute order denying the motion, after which the Office answered the complaint. *See* Appendix bound with Jurisdictional Statement (S.J. App.) at 9a n.5.[1] Appellant then appealed to the Court of Appeals for the District of Columbia Circuit, which consolidated this case for *en banc* argument with another appeal involving the Speech or Debate privilege, *Fields v. Office of Representative Eddie Bernice Johnson*, No. 04-5315 (D.C. Cir.). In August 2006, the court unanimously decided that the Speech or Debate Clause does not bar suits under the CAA and affirmed the orders denying dismissal in both *Hanson* and *Fields*.

Eight judges sat on the *en banc* court. Judge Randolph's opinion for five judges was the opinion of the court on most issues, but Judge Rogers declined to concur on one—the proper treatment of the Speech or Debate Clause's evidentiary privilege—and wrote a separate opinion. Judge Tatel, who joined Judge Randolph's opinion, also wrote a concurrence. Judge Brown wrote an opinion concurring in the judgment for three judges.

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[1] Owing to a miscommunication, appellant's answer to the complaint was omitted from the parties' Joint Appendix, and it is reprinted in the appendix bound with this brief (Br. App.).

3. *Facts.*[2] Brad Hanson joined Mark Dayton's Minnesota Senate campaign in July 2000. He designed and ran a successful advocacy program, the Health Care Help Line, which offered assistance to Minnesotans having difficulties with their health insurance carriers, HMO's or physicians. After Senator Dayton was elected, Hanson joined his staff as the State Office Manager in Minnesota and set up the Senator's three offices in the state, as well as managing the transition of the Health Care Help Line to the Senate office. Hanson worked a substantial amount of unpaid overtime and performed all his assignments capably.

Early in 2002, Hanson began experiencing cardiac arrhythmia and was told that he needed a coronary ablation, which would entail a short hospitalization and a recovery period of two to three weeks. He told others on the staff but also wanted to inform Senator Dayton personally and spoke to the Senator when he was in Minnesota on July 3, 2002. Senator Dayton summarily fired Hanson during the meeting.

During his tenure on Senator Dayton's staff, Hanson spent the vast bulk of his time on administrative matters and constituent services, especially managing the Health Care Help Line. In its answer to the complaint, the Senator's Office said that Hanson was fired because of claimed deficiencies in his work on the Help Line: "Senator Dayton . . . informed Mr. Hanson that . . . [the Senator] had concluded that the [Health Care Help Line's] problems were caused by Mr. Hanson's poor performance and that Mr. Hanson . . . had to leave the Office." Br. App. 5a, ¶ 10. Hanson disputes any criticism of his performance on the Health Care Help Line but, in any event, his management of the Help Line was a

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[2] Except as indicated, the facts set forth in this section are taken from the complaint, which appears in the Joint Appendix (JA) at 10, and whose allegations must be accepted as true because the immunity defense was raised in a motion to dismiss. *Clinton v. Jones*, 520 U.S. 681, 685 (1997).

constituent service—casework—that all congressional offices perform and is not legislative in nature.

SUMMARY OF ARGUMENT

The crux of this case is whether the Congressional Accountability Act—in particular, its single most significant reform, judicial enforcement—can co-exist with the Speech or Debate Clause. Appellant says no, at least not with respect to the many congressional employees having legislative duties. But the Act's text and structure show that Congress intended to cover *all* its employees, and the District of Columbia Circuit properly concluded that it was lawful to do so.

1. The Speech or Debate Clause grew out of the sometimes violent battles between Monarch and Parliament, in which Members were jailed for criticizing the executive on the floor of the House of Commons. The Clause provides that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." Its root purpose is "to prevent intimidation by the executive and accountability before a possibly hostile judiciary," *United States v. Johnson*, 383 U.S. 169, 181 (1966), and it is essential to legislative independence.

The Clause protects legislative acts, those within "the sphere of legitimate legislative activity." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam). Members of Congress are absolutely immune from challenges to their activities within that sphere, and the Clause also provides an evidentiary privilege that allows Members to refuse to testify about legislative acts even when they are properly in court.

Merely being related to legislative procedures, however, is not enough to convert an action by a Member of Congress into a legislative act: "in no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process." *United States v. Brewster*, 408 U.S. 501, 515

(1972) (emphasis original). Instead, "[t]he heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings." *Gravel v. United States*, 408 U.S. 606, 625 (1972).

2. Routine personnel decisions, *e.g.*, hiring, firing, promotion, are not legislative acts. Appellant argues otherwise, contending that a Member's management of his legislative staff is necessary to the production of sound legislation. That seems a stretch, and the Court has confirmed that it is: "We would not think it sound or wise . . . to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process." *Brewster*, 408 U.S. at 516. If that were done, "we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." *Id.*

The Court has not addressed personnel decisions in the context of the Speech or Debate Clause, but it has examined them in the analogous setting of judicial privilege. Like the legislative privilege, which is absolute within the legislative sphere, judicial privilege is absolute within the judicial realm. But in *Forrester v. White*, 484 U.S. 219 (1988), the Court held that personnel decisions made by a judge were administrative in nature, not judicial, and so were not shielded by judicial privilege: "Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts . . . may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative." *Id.* at 229.

The only decision ever to adopt appellant's theory was *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d

923 (D.C. Cir. 1986). All eight members of the *en banc* court below agreed that *Browning* was wrongly decided and should be overruled.

3. Passage of the Congressional Accountability Act marked a sea change in the way Congress does business. In the decades before the Act, Congress routinely exempted itself from the workplace obligations it imposed on the public at large with statutes like the Fair Labor Standards Act and Title VII. In the CAA, however, Congress turned about face, applying some eleven labor and employment laws to the legislative branch.

Both the text of the CAA and its history show Congress' intention to cover *all* legislative branch workers, including the many employees with legislative tasks whom appellant contends may not be reached. Congress was sensitive to concerns about the separation of powers and for that reason expressly deprived the executive of any role under the CAA. But the Members saw judicial enforcement—*i.e.*, granting congressional employees a private right of action to enforce their rights—as the Act's core reform, and Congress expressly decided that the Speech or Debate Clause was not a barrier here. The congressional view is of course not dispositive, but "the interpretation of its powers by any branch is due great respect from the others," *United States v. Nixon*, 418 U.S. 683, 703 (1974), especially where a branch (here the legislative) acted after "weigh[ing] competing constitutional interests in an area in which it enjoys particular expertise," *McConnell v. Federal Election Commission*, 540 U.S. 93, 137 (2003).

Congress wrote the executive out of the Act, but it decided that judicial enforcement would not pose a threat to its independence and was essential to giving its own employees the same rights as other American workers. That judgment, which is still shared by both the Senate and the House of

Representatives, as is evident from the *amicus* briefs submitted in this case, should be respected.

4. The opinions below set forth two approaches to resolving the Speech or Debate issue. The judgment can be sustained on either, but in fact both have merit. Judge Randolph's opinion for the court assumes that the defendant in this case—the Office of Senator Mark Dayton—is itself protected by the Clause. But since Hanson's complaint did not challenge legislative acts, the district court had jurisdiction to decide the case.

Judge Brown's opinion concurring in the judgment differs with Judge Randolph's premise. She does not believe that the Office is protected by the Speech or Debate Clause in the first place, and so there is nothing to stop a court from asserting jurisdiction over a claim naming the Office as the defendant. There is much to commend Judge Brown's analysis. In particular, there are many factors indicating that Congress is the real party in interest, not the Office of Senator Dayton, which is simply a stand-in for Congress, a legal fiction unprotected by the Speech or Debate privilege.

Among the factors supporting Judge Brown's approach are that CAA litigation is defended by institutional counsel; the Act defines "covered employee" as (among other things) an employee of the Senate, rather than a particular employing office; the Act provides that all employees are eligible for damages of a magnitude only available against employers with more than 500 employees, a threshold met by Congress itself but not by Members' offices; settlements do not become effective until approved by the Executive Director of the Office of Compliance, an office within Congress; and the Act creates a special judgment fund to satisfy awards and settlements, and the fund is available to pay judgments after a Member leaves Congress.

If Judge Brown is right that the Office is not subject to the Clause, that ends the matter. It is not necessary to reach that issue, though, because Judge Randolph correctly saw that this case does not implicate legislative acts.

The court below did not reach a decision on how the evidentiary privilege should play out in this case, but that would have been premature for a lawsuit in its infancy, where no discovery has yet been taken. Judge Tatel, concurring below, believed that questions about the proper application of the evidentiary privilege will be "more easily answered after further factual development," and he noted that all members of the *en banc* court agreed that "the question of what precisely the Clause precludes is best resolved on a case-by-case basis." J.S. App. 31a.

In any event, further litigation in this case is unlikely to go anywhere near legislative acts, because appellant's reason for firing Hanson—ostensibly poor performance managing the Health Care Help Line—does not involve matters that are legislative in nature. The Help Line was a legitimate constituent service—assisting people who had problems with their health insurance carriers, HMO's or physicians—but it was not in the legislative sphere. Instead, it was among the "wide range of legitimate 'errands' performed for constituents" that are "political in nature rather than legislative." *Brewster*, 408 U.S. at 512.

5. The appeal should be dismissed. The decision below does not satisfy the standards of the direct appeal statute, 2 U.S.C. § 1412, because Judge Randolph's opinion for the court does not decide "the constitutionality of any provision" of the CAA. Certiorari should also be denied, because appellant does not meet the standards of the Court's Rule 10—there is no division in the circuits, and the D.C. Circuit scrupulously followed the Court's Speech or Debate Clause and related precedent. Certiorari is, however, more flexible than the appeals process, and appellee believes that, should

the Court wish to review this case on the merits, certiorari is the better vehicle. *See* Brief for the United States Senate as *Amicus Curiae* at 12.

Finally, this case is not moot. The expiration of a Member's term of office does not moot a case so long as there is a live dispute for which relief can be provided. *Davis v. Passman*, 442 U.S. 228, 245 (1979); *Powell v. McCormack*, 395 U.S.486, 498 (1969). Hanson stipulated that he was not seeking reinstatement before Senator Dayton announced that he would not run for reelection, but the parties seriously dispute Hanson's entitlement to back pay or damages. As is evident, appellant is vigorously represented by counsel provided by the Senate. And if Hanson prevails, there is a fund available to satisfy the judgment. These are not factors associated with a moot case.

Appellant assumes that when Senator Dayton left the Congress, the Office of Senator Dayton ceased to exist. But the Office is a term of art created expressly for purposes of the CAA, a "legal fiction" in the words of former Congressman Henry Hyde. The Act does not state or in any way imply that a district court's jurisdiction is extinguished on the last day of a Member's term of office. In particular, nothing in the language creating the special judgment fund says that the fund may not be used to satisfy judgments after a Member leaves office.

We mentioned above the ample support for Judge Brown's theory that Congress—not the employing office—is the real defendant in a CAA case. It is not necessary to subscribe in full to see that Congress provided several mechanisms (*e.g.*, institutional counsel, the availability of a judgment fund) to insure that cases would not be mooted by the expiration of a Member's term.

ARGUMENT

I. APPELLANT IS NOT IMMUNE FROM SUIT UNDER THE CAA

The Speech or Debate Clause of the Constitution is a bulwark of legislative independence, providing both immunity from suit challenging legislative acts and an evidentiary privilege concerning them. Members conduct much official business, however, that does not involve legislative acts, and the Speech or Debate Clause does not protect such activity. *See, e.g., Gravel v. United States*, 408 U.S. 606, 625 (1972) ("That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature."); *United States v. Brewster*, 408 U.S. 501, 512 (1972) ("A Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts").

When the Court has extended the privilege beyond the literal words of the Constitution—speech or debate—it has been careful to protect only conduct which is legislative at its core, such as voting or committee proceedings. *See, e.g., Gravel v. United States*, 408 U.S. 606, 625 (1972). The act in question in this case, a Senator's firing of an aide, is not legislative, and it is not entitled to protection from the Speech or Debate Clause.

A. The Court's Speech or Debate Jurisprudence Does Not Confer Immunity on Appellant

The Court has directly addressed the Speech or Debate Clause in ten cases involving Members of Congress:

Kilbourn v. Thompson, 103 U.S. 168 (1880)
United States v. Johnson, 383 U.S. 169 (1966)
Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam)

Powell v. McCormack, 395 U.S. 486 (1969)
United States v. Brewster, 408 U.S. 501 (1972)
Gravel v. United States, 408 U.S. 606 (1972)
Doe v. McMillan, 412 U.S. 306 (1973)
Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975)
United States v. Helstoski, 442 U.S. 477 (1979)
Hutchinson v. Proxmire, 443 U.S. 111 (1979)

The Clause has also been discussed in cases holding that legislators in state, regional or local governments can assert an equivalent common law privilege. *See Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (regional legislators); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (local legislators). Together, these congressional and state cases address the types of acts to which the Speech or Debate privilege applies, its effect, and the identity of those protected by the privilege (in addition to the legislators themselves). As becomes evident, none of this authority supports the idea that personnel decisions, such as who to hire, promote or fire, are routine legislative acts entitled to immunity.

The Court's first Speech or Debate case, *Kilbourn v. Thompson*, held that Members of the House could not be sued for issuing an invalid order finding an individual in contempt, because issuance of the order came within the ambit of the Clause, *i.e.*, "to things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204. The Court continued to apply variations of this formulation in later cases, *e.g.*, *United States v. Johnson*, 383 U.S. at 172 ("the due functioning of the legislative process"); *Dombrowski v. Eastland*, 387 U.S. at 85 ("the sphere of legitimate legislative activity").

In *Brewster*, however, the Court cautioned that "in no case has this Court ever treated the Clause as protecting all

conduct *relating* to the legislative process. * * * [T]he Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process – the *due* functioning of the process." 408 U.S. at 515-16 (emphasis original) (footnote omitted). In similar fashion, the Court in *Gravel* said that its earlier decisions in *Kilbourn*, *Dombrowski* and *Powell* "reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." 408 U.S. at 620.

The focus on whether conduct was truly a part of the legislative process, as opposed to merely related or preparatory to legislative activity, guided the Court in *Gravel:*

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

408 U.S. at 625.

The Court's most recent Speech or Debate case quoted this passage from *Gravel* but emphasized certain portions, specifically—"Insofar as the Clause is construed to reach other matters, *they must be an integral part of the deliberative and communicative processes* by which Members participate *in committee and House proceedings* with respect to the consideration and passage or rejection of proposed legislation. . . ." *Proxmire*, 443 U.S. at 126 (emphasis original).

The closest the Court has come to addressing an action related to employment under the legislative privilege occurred in *Bogan v. Scott-Harris.* In *Bogan*, the plaintiff

challenged a city council decision adopting an ordinance that eliminated her one-person department, claiming racial animus and retaliation. After holding that local legislators were entitled to the same privilege that *Tenney* and *Lake Country Estates* gave to their peers at the state and regional level, 523 U.S. at 54, the Court then decided that passage of the ordinance in question was a legislative act for which the legislators were immune from suit. In particular, the "acts of voting for an ordinance were, in form, quintessentially legislative." *Id.* at 55. And in substance, the ordinance "bore all the hallmarks of traditional legislation." *Id.* Among other things, it "involved the termination of a position," based on policy and budgetary concerns. The Court specifically distinguished the legislation in *Bogan* from typical employment decisions such as the "hiring or firing of a particular employee" (which are at issue in most CAA cases), because elimination of a position "may have prospective implications that reach well beyond the particular occupant of the office." *Id.* at 56.

Bogan presents the rare circumstance in which an action affecting employment was legislative in nature. In Brad Hanson's case, of course, no vote was taken when he was dismissed; nor was his position eliminated. He was just fired.

B. Managing an Employee Is Not a Legislative Act

Appellant contends that a Member's management of a staffer, at least one with legislative duties—which it says included Hanson[3]—is a legislative act. It is not.

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[3] The parties disagree about how much of Hanson's time was devoted to legislative duties, *see* J.S. App. 39a-40a, but in any event the Office's asserted reason for Hanson's firing—his ostensibly poor performance managing the Health Care Help Line was not a legislative task. *See* Section I.F below.

The activities other than pure speech or debate held protected by the Clause all fit easily within the Court's formulation in *Gravel*, 408 U.S. at 625: they were "integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings"—*i.e.*, voting for an invalid contempt order, *Kilbourn*, 103 U.S. at 205; voting to issue subpoenas, *Dombrowski*, 387 U.S. at 84; voting to exclude a Member, *Powell*, 395 U.S. at 550; participating in a committee meeting, regardless of the kind of material read aloud or placed in the public record, *Gravel*, 408 U.S. at 615; introducing allegedly defamatory material at committee hearings and voting for publication of a report containing the material, *Doe v. McMillan*, 412 U.S. at 312; and participating in a legislative investigation, *Tenney*, 341 U.S. at 377, including voting to authorize committee investigations and to issue supporting subpoenas, *Eastland*, 421 U.S. at 505.

These are not close calls. Many of these protected activities involve voting, perhaps the archetypal form of "deliberative and communicative" expression used in "committee and House proceedings," so that voting is "quintessentially legislative" in character. *Bogan v. Scott-Harris*, 523 U.S. at 55. The other protected activities all involve some form of participation in committee hearings and are plainly "an integral part of the deliberative and communicative processes by which Members participate in committee . . . proceedings." *Gravel*, 408 U.S. at 625, *quoted with emphasis in Proxmire*, 443 U.S. at 126.

Routine personnel decisions, in contrast, are not *any* part of the "deliberative and communicative processes" used to participate "in committee or House proceedings," let alone an "integral" part. Appellant contends that personnel actions are related to the legislative process because a Member needs competent staffers to be able to participate. In *Brewster*, though, the Court said that "in no case has this Court ever

treated the Clause as protecting all conduct *relating* to the legislative process." 408 U.S. at 515 (emphasis original) (footnote omitted). Instead, "the Speech or Debate Clause has been limited to an act which was *clearly a part of the legislative process*—the *due* functioning of the process." *Id.* at 515-16 (first emphasis added; second emphasis ("due") original) (footnote omitted).

A personnel decision is not "clearly a part of the legislative process," and appellant's attempt to make it fit requires too much elastic:

> We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to "relate" to the legislative process.

Brewster, 408 U.S. at 516.

The most that appellant can claim of typical employment decisions is that they are taken in preparation for a Member's legislative activity; that is, by deciding who to hire, promote or fire, the Member or his designee exerts control over who will perform work on a legislative agenda. But as this Court cautioned in *Gravel*, the Clause does not reach conduct that is merely preparatory to, but not itself a part of, the legislative process:

> While the Speech or Debate Clause recognizes speech, voting and other legislative acts, as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law *in preparing for* or implementing legislative acts.

408 U.S. at 626 (emphasis added).

Commentators have focused on the important distinction between preparatory conduct and actual legislating in concluding that the privilege does not apply to the former: "In establishing terms and conditions of employment for top aides, a member decides what is necessary to enable her to participate as an effective legislator, but that decision is not itself a form of legislative participation." James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees,* 36 Harvard J. on Legis. 1, 43 (1999).

Professor Nelson Lund, who testified in 1994 before the Joint Committee on the Organization of Congress, agreed:

> The law can be summarized in very simple terms: It provides absolute immunity for purely legislative activities but not other forms of official conduct. The issue I have been asked to address reduces to just one question: Are employment-related decisions such as hiring and firing congressional aides, setting their pay scales, and bargaining with employee unions part of the legislative process, or are they official but non-legislative decisions? It seems to me that the answer is perfectly clear. Employment decisions can be very important in facilitating the legislative process, but they are not part of it.

Summary of Hearings on Application of Laws, Joint Committee on the Organization of Congress, Application of Laws and Administration of the Hill Hearing (June 8, 1993); *see* www.rules.house.gov/archives/jcoc2aj.

The Court has not directly confronted the application of the Speech or Debate Clause to employment decisions, but in *Forrester v. White*, 484 U.S. 219 (1988), it rejected the argument made by appellant here. In *Forrester*, a probation officer brought an action under 42 U.S.C. § 1983 against the state court judge who had fired her. Judge White argued, as appellant does here, that he relied on his staff to perform

important delegated judicial functions, so his supervision of those functions should have been deemed a judicial act subject to judicial privilege. The Seventh Circuit accepted this reasoning and held the judge immune from suit, with Judge Posner dissenting. The majority said:

> It is, for example, of fundamental importance that the modern judge differs from his predecessor in that he must rely more on his staff for advice on substantive decisions, and that certain research functions formerly performed by the judge are now accomplished in part by his staff. A judge's institutional personality, therefore, extends beyond his person.

Forrester v. White, 792 F.2d 647, 654 (7th Cir. 1986).

This Court unanimously reversed, finding that Judge White's conduct as a supervisor was administrative, not judicial. In so holding, the Court adverted to the Speech or Debate Clause:

> This Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause. . . . Even here, however, the Court has been careful not to extend the scope of the protection further than its purposes require.

484 U.S. at 224.

The Court observed that "[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not . . . been regarded as judicial acts" warranting immunity. *Id.* at 228. "[T]he nature of the function performed, not the identity of the actor who performed it . . . inform[s] [the Court's] immunity analysis," *id.* at 229, so the judge was not entitled to immunity from suit:

> Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those

> acts—like many others involved in supervising court employees and overseeing the efficient operation of a court—may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative.

Id.

Senator Dayton's conduct here—firing an employee—was also administrative, even though "supervising [legislative] employees and overseeing the efficient operation of a [congressional office] . . . may [be] quite important in providing the necessary conditions of a sound [legislative] system." It is simply not legislative activity entitled to immunity.

Appellant objects that *Forrester* involved a common law privilege, not one written into the Constitution. But the Speech or Debate Clause is itself rooted in the English common law. *See Tenney*, 341 U.S. at 372 ("The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries."). It is for this reason that the Court "generally ha[s] equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 733 (1980).[4]

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[4] Appellant says that judicial immunity is less protective in some situations than legislative immunity under the Speech or Debate Clause, citing *Dennis v. Sparks*, 449 U.S. 24 (1980), and *United States v. Giliock*, 445 U.S. 360 (1980). Even assuming this is true, the Office has not shown that any differences matter in terms of demonstrating why the Court's approach to privilege in *Forrester* should not be employed in Speech or Debate cases. In any event, the Court in *Dennis* accorded immunity to an allegedly corrupt judge and noted that "in general, the scope of state legislative immunity for purposes of § 1983 has been patterned after immunity under the Speech or Debate Clause." 449 U.S. at

C. The D.C. Circuit Correctly Overruled *Browning*

Appellant's argument relies entirely on the approach to legislative immunity adopted in *Browning*, which the unanimous *en banc* court below "reject[ed]" and "repudiate[d]." J.S. App. 27a (Randolph , J.); *id.* at 45a (Brown, J.). In *Browning*, the D.C. Circuit had focused on the identity of the employee—in particular, whether the duties associated with her position were legislative in nature—and held that, "[w]here the duties of the employee implicate Speech or Debate Clause concerns, so will personnel actions respecting that employee," 789 F.2d at 928, so "the standard for determining Speech or Debate Clause immunity is best expressed as whether the employee's duties were directly related to the due functioning of the legislative process," *id.* at 929 (emphasis removed).

In the present case, the court of appeals correctly saw *Browning* as irreconcilable with this Court's Speech or Debate jurisprudence, as well as the Court's decisions in related areas, particularly *Forrester*, where the Court said that "the nature of the function performed, not the identity of the actor who performed it . . . inform[s] [its] immunity analysis." 484 U.S. at 229. The functional approach to immunity taken in *Forrester*—grounding immunities in "the nature of the function performed" by the official making the personnel decision—was quite clearly in tension with *Browning*'s emphasis on the duties of the aggrieved employee. The Court's treatment of the Speech or Debate Clause has similarly examined the functions performed by the Member asserting privilege. *See, e.g., Johnson*, 383 U.S. at 172, 177 (distin-

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30, *citing Supreme Court of Virginia*, 446 U.S. at 732-34. And *Gillock*, in which a state legislator was charged with violating federal criminal law, was simply a Supremacy Clause case: "in those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power." 445 U.S. at 370.

guishing between lobbying the Department of Justice, which was not protected by the Clause, and a floor speech, which was); *Brewster*, 408 U.S. at 526-28 (distinguishing between protected voting and unprotected promises to vote a certain way); *Gravel*, 408 U.S. at 622-27 (convening a hearing about the Pentagon Papers and placing them into the public record was privileged, but arranging for private publication was not).

Given the palpable inconsistency between this Court's immunity decisions and *Browning*, all eight D.C. Circuit judges sitting *en banc* agreed that the case should be overruled. *See* J.S. App. 17a (Randolph, J., opinion for the Court in part) (*Browning* "is, at a minimum, over inclusive"); *id.* at 28a (Rogers, J., concurring in part and in the judgment) ("the employee-duties test of *Browning* . . . is overbroad and must be rejected"); *id.* at 45a (Brown, J., concurring in the judgment) ("by focusing on the duties of the complaining employee . . . *Browning* established a much broader immunity than necessary to protect legislative independence, and nothing in the Speech or Debate Clause or the Supreme Court's precedents compelled this broad immunity").

Judge Randolph noted that the Tenth Circuit in *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004), cert. denied, 126 S.Ct. 396 (2005)—the only other court of appeals to address Speech or Debate immunity in the context of the CAA—"considered [*Browning*] inconsistent with the Supreme Court's Speech or Debate Clause jurisprudence." J.S. App. 11a. Recently, a third court of appeals has joined D.C. and the Tenth Circuit in rejecting *Browning*. *Fowler-Nash v. The Democratic Caucus of the Pennsylvania House of Representatives*, 469 F.3d 328, 335-37 (3d Cir. 2006).[5] There is no division in the circuits on this issue.

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[5] The only other court to adopt an analysis similar to *Browning*'s, although not in the context of the Speech or Debate Clause, was the First

Appellant is engaged in a transparent attempt to resuscitate *Browning*. The Question Presented—whether the Speech or Debate Clause "bar[s] federal court jurisdiction of an action brought under the [CAA] by a congressional employee whose job duties are part of the due functioning of the legislative process"—is precisely the approach that the D.C. Circuit took in *Browning*, as Judge Randolph explained in detail. *See* J.S. App. 17a. *Browning*'s perspective is inconsistent with this Court's precedent on immunity, as three circuits have recognized.[6]

D. Congress Crafted the CAA Cognizant of Speech or Debate Concerns

In *Davis v. Passman*, 442 U.S. 228 (1979), the Court fashioned a *Bivens*[7] remedy for a congressional employee

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Circuit in *Agromayor v. Colberg*, 738 F.2d 55 (1st Cir. 1984), which preceded *Forrester* by four years. The court in *Fowler-Nash* explained that "[t]he Court of Appeals for the First Circuit has repeatedly undermined or ignored *Agromayer*." 469 F.3d at 334.

[6] Judge Randolph, J.S. App. 19a, properly rejected any analogy between Speech or Debate immunity and the immunity of the President recognized in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), on which appellant also relies. In *Fitzgerald*, the Court concluded that the President, who "occupies a unique position in the constitutional scheme," *id.* at 749, "is entitled to absolute immunity from damages liability predicated on his official acts." *Id.* The President's immunity extends to *all* his official functions, including personnel matters at the Pentagon: "In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 755. Unlike the President, however, Members of Congress enjoy absolute immunity only for actions within a subset of their official functions—legislative acts. And even here, "[i]t is not enough that a Member's conduct is within the outer perimeter of the legislative process." J.S. App. 19a.

[7] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

claiming sex discrimination but did not address the Speech or Debate privilege. Chief Justice Burger dissented, saying "Congress could, of course, make *Bivens*-type remedies available to its staff employees . . . but it has not done so. * * * until Congress legislates otherwise as to employment standards for its own staffs, judicial power in this area is circumscribed." *Id.* at 249, 250. Congress has now acted.

1. *Background to Enactment*

Passage of the Congressional Accountability Act in 1995 overturned a decades-old congressional practice. Before the CAA, from the enactment of the Fair Labor Standards Act in 1938 through passage of the Family and Medical Leave Act in 1993, Congress systematically exempted the legislative branch from workplace obligations it imposed on the private sector, state and local governments, and the executive. During the debate on the CAA, Senator Smith recalled that "[f]or decades, Congress has routinely—routinely—exempted itself from a wide range of laws governing such matters as civil rights, employment discrimination, sexual harassment, workplace safety, and on and on and on. In a very real sense, then, Congress indeed has placed itself above the law." 141 Cong. Rec. S455.

Voters grew increasingly disenchanted, however,[8] and Congress reversed course with the Accountability Act, which applied eleven workplace statutes to all offices in the legislative branch, 2 U.S.C. § 1302(a).[9] The CAA's passage

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[8] Senator Grassley said that "nothing makes Americans madder than knowing that they have to live by laws that their Representatives in Congress do not." 141 Cong. Rec. S441.

[9] The laws applied are (1) the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.*, (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, (3) the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*, (4) the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, (5) the

culminated a lengthy process extending over three Congresses. Before the 102nd Congress, both Houses provided protection to legislative branch employees only through internal rules, which Members such as Senator Simpson acknowledged were ineffective: "We set rules which allow us to go about our merry way with little fear that if we do happen to cross the line from time to time, it doesn't really matter because there is no practical enforcement mechanism." 141 Cong. Rec. S686.

The tide began to turn in the 102nd Congress during the debate on the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071 (1991), when Senators Grassley and Mitchell proposed an amendment that among other things gave employees of the Senate—but not the House of Representatives—some protection from the types of discrimination prohibited by Title VII, the ADEA and the ADA. The amendment, adopted as Title III of the 1991 Act, became the Government Employee Rights Act (GERA), *formerly* 2 U.S.C. §§ 1201 *et seq.* It provided for administrative hearings and record review of administrative decisions in the Federal Circuit—but not a private right of action in district court.[10]

GERA was not enough—and not just because the House was exempt. Both GERA and the internal House rules relied on administrative processes that were widely deemed

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Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2611 *et seq.*, (6) the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651 *et seq.*, (7) Chapter 71 of Title 5 (relating to Federal service labor-management relations), 5 U.S.C. §§ 7101 *et seq.*, (8) the Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001 *et seq.*, (9) the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 *et seq.*, (10) the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, and (11) Chapter 43 of Title 38 (relating to veterans' employment and reemployment), 38 U.S.C. §§ 4301 *et seq.*

[10] GERA was supplanted in 1995 by the broader CAA. *See* 2 U.S.C. § 1435(a).

inadequate and in any event out of step with what Congress had provided for the rest of the country. In the 103rd Congress, the House of Representatives passed an accountability bill, H.R. 4822, by a vote of 427-4, in August 1994. [11] The Senate Committee on Governmental Affairs conducted hearings and issued a favorable report on a similar bill in October 1994, but the Senate adjourned for the campaign before taking it up.

The Republican Party then made the enactment of accountability legislation a campaign issue in the November 1994 mid-term election—part of the "Contract with America"[12]—and the Congressional Accountability Act was the first statute passed by the new 104th Congress following the party's sweeping victory. The House acted first, passing H.R. 1 on January 4, 1995, immediately after the Republicans organized the chamber, by a vote of 429-0.[13] On January 11, the Senate passed S. 2, a slightly different version of the accountability legislation, 98-1, with only Senator Byrd dissenting.[14] On January 17, the House avoided a conference and itself passed S. 2, 390-0.[15] The President signed the bill into law on January 22, 1995.[16]

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[11] 140 Cong. Rec. H7370.

[12] Among other things, the Contract promised to "require all laws that apply to the rest of the country also apply equally to the Congress." *See* www.nationalcenter.org/ContractwithAmerica.

[13] 141 Cong. Rec. H104.

[14] 141 Cong. Rec. S767.

[15] 141 Cong. Rec. H286. The House felt secure in dispensing with a conference because H.R. 1 and S. 2 were substantively the same. Representative Thomas reported to the House that "[t]he only substantive difference in S. 2 from H.R. 1 . . . is the addition of the Veterans Reemployment Act to the list of bills under which Congress will now operate." 141 Cong. Rec. H269.

[16] 1995 WL 14935.

Congress could act quickly because the 1995 Act borrowed liberally from the approach considered in 1994. No new hearings or reports were deemed necessary, and the pertinent reports are those issued a few months earlier in the 103rd Congress—S.Rep. 103-397 (Oct. 3, 1994), H.Rep. 103-650 (I) (Aug. 2, 1994), and H.Rep. 103-650 (II) (Aug. 2, 1994).[17] Indeed, S. 2, the bill that passed, was "almost identical" to the bill the Senate Committee on Governmental Affairs had reported favorably in the 103rd Congress. S765 (Mr. Rockefeller).

2. *The Act's Salient Reform: Judicial Enforcement*

Judicial enforcement—affording congressional employees the same access to the judiciary enjoyed by their private sector counterparts—was the CAA's single most significant reform. Senator Snowe observed that under the House's internal administrative scheme, "just 16 staffers in 4 years had enough confidence in the office to file complaints [and] only four cases went to the end of the grievance process." 141 Cong. Rec. S665. She said that "the legislative branch has been entirely incapable of policing itself," so "[s]trong enforcement measures are absolutely necessary if we are going to make Congress abide by the same laws that apply to the private sector." *Id.*

Members of Congress agreed that "strong enforcement" meant judicial enforcement. Thus, S.Rep. 103-397 (Oct. 3, 1994), which just three months earlier had reported a bill "almost identical" to S. 2, said that the "most significant" addition to the GERA regime was "the option of initiating an action in federal district court." *Id.* at 23. And Representative Fawell explained that "members are currently exempt from the *most important aspect* of many private sector laws, the right of employees to sue the employer in

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[17] *See* 141 Cong. Rec. S475 (Mr. Roth); *id.* at H103 (Mr. Fawell).

trial court for damages. In this day and age, these employee rights are what put the 'teeth' into many of our private sector labor laws." 141 Cong. Rec. H103 (emphasis added).

3. *The Statutory Text*

Appellant argues that the statute must be interpreted in a manner which would deprive any legislative branch employee with duties related to the legislative process the right to pursue claimed violations of the CAA in court. This argument finds no support in the statutory text.

The definitions in 2 U.S.C. § 1301 show the statute's breadth; it covers literally every employee in the legislative branch. Thus "[t]he term 'covered employee' means any employee" of the House of Representatives and the Senate (as well as employees of seven other legislative branch offices, such as the Capitol Police). *Id.* at § 1301(3). Further, "employee of the House of Representatives" and "employee of the Senate" include workers paid through the Clerk of the House or the Secretary of the Senate, respectively, the entities that customarily disburse pay to the personal staffs of the Members, as well as to committee staffers. 2 U.S.C. § 1301(7), (8).

A civil action, in turn, is available to any "covered employee who has completed counseling . . . and mediation." 2 U.S.C. § 1408(a). The defendant in any civil action is the "employing office" alleged to have committed the violation or in which it occurred. *Id.* at 1408(b). And the Act defines "employing office" as, among other things, the personal office of a Member of Congress or a committee of either House (or a joint committee). 2 U.S.C. § 1301(9)(A), (B).[18]

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[18] The Act's specification of a defendant in civil actions involving the legislative branch is quite similar to the approach used when Title VII was applied to the executive branch by the Equal Employment Opportunity Act of 1972, 86 Stat. 103. New section 717(c), 42 U.S.C. § 2000e-16(c),

Finally, section 415, 2 U.S.C. § 1415, provides for payment of all CAA awards and settlements out of a special fund created specifically for this purpose. There are no temporal limits on the use of this fund—specifically, no prohibition on payments of an award or settlement after the expiration of a Member's term of office. The only limit of any kind is a bar to use of the fund to remedy matters related to OSHA or to accommodation and accessibility standards. 2 U.S.C. § 1415(c).[19]

The statutory text is unambiguous. Congress intended that all its employees would have the same rights under the CAA, including the right to go to court.

4. *Congress Carefully Considered Separation of Powers Issues, Including Speech or Debate*

Appellant argues about the Speech or Debate Clause and more broadly about separation of powers generally. But Congress carefully considered both principles in the CAA and decided to provide all legislative branch employees the right to enforce CAA claims in court. Congress is of course free to repeal the CAA if it ultimately determines that the Act presents a threat to legislative independence, but there is no indication that it does; indeed, the Senate's decision to file an *amicus* brief supporting appellee shows that Congress remains comfortable with the balance the CAA has struck.

"The Speech or Debate Clause reinforces the separation of powers and protects legislative independence." J.S. App. 12a, *citing Eastland*, 421 U.S. at 502; *Brewster*, 408 U.S. at

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provided that the defendant in any civil action must be the head of the appropriate department, agency or unit, while the CAA specifies the defendant in a lawsuit must be the employing office.

[19] Section 415 also makes clear that the fund may not be used to pay awards or settlements for the General Accounting Office, the Government Printing Office or the Library of Congress. 2 U.S.C. § 1415(a).

507; *Johnson*, 383 U.S. at 1278; *Gravel*, 408 U.S. at 616; *Powell*, 395 U.S. at 503; *Tenney*, 341 U.S. at 373. More particularly, "the privilege was not born primarily of a desire to avoid private suits . . . but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *Johnson*, 383 U.S. at 181.

The Clause itself does not mention either the executive or judicial branches. It is evident, though, that the focus in terms of separation of powers is on the long struggle between an at times "intimidating" executive and the legislature. Indeed, the Court has sometimes spoken solely of the executive in explaining why the Speech or Debate privilege is essential to maintaining the separation of powers, *e.g.*, *Gravel*, 408 U.S. at 616 ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.").

Maintenance of the separation of powers is a perennial concern of Congress, and this was especially evident when it considered what became the CAA. But Congress worried about usurpations by the executive—not the judiciary. So Congress literally wrote the executive out of the Act in 2 U.S.C. § 1361(f)(3) (prohibiting any construction of the CAA which would "authorize enforcement by the executive branch"), while at the same time giving the judiciary a crucial enforcement role.

This was a considered decision. The Committee on House Administration, in favorably reporting HR 4822—one of the Act's forerunners—in August 1994, said that the bill's authors were guided by "three basic principles," one of which was, "[t]he separation of powers embodied in the Constitution must be respected." Specifically, "[t]he Legislative Branch must be free from Executive Branch intimidation real or perceived in the execution of its Constitutional role as a co-

equal branch of the federal government." H.Rep. 103-650 (II) at 11.[20]

At about the same time, the Senate Governmental Affairs Committee adopted the view that "the separation-of-powers concerns that make executive-branch enforcement unacceptable are not applicable to district court actions." S.Rep. 103-397 at 6. Senator Grassley, the principal Republican sponsor of the CAA and the Republican floor manager when it passed in 1995, explained the congressional reasoning:

> Allowing access to district courts makes the available remedies more like those available to both private-sector and executive-branch employees. Courts and judges do not have the complex interactions with Congress that executive agencies have, so the risk of intimidation would not arise.

141 Cong. Rec. S444.

Against this background, Congress expressly rejected the notion that the Speech or Debate Clause limited its power to make a judicial forum available to its employees. Senator Lieberman, the CAA's principal Democratic sponsor in the Senate, said that one argument against the legislation "goes to the heart of the construct of the bill that Senator Grassley, I, and Senator Glenn, in his capacity as chair last year of the Government Affairs Committee, have brought out. The argument is that this bill . . . represents a violation or a potential violation of the separation of powers doctrine and the speech or debate clause." 141 Cong. Rec. S700. He said that the sponsors of the CAA disagreed: "our conclusion was that [the speech and debate clause] should not and cannot provide Members of Congress with immunity for illegal employment actions, for illegal actions in our capacity as employers of those who work for and with us here on Capitol Hill." *Id.* at S701.

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[20] *See* text accompanying n.17 above.

Senator Grassley struck a similar note, saying there had been "reference to the *Browning* case, decided by the D.C. circuit in 1986." 141 Cong. Rec. S639. Then he discussed the effect of *Forrester* on *Browning* and concluded, "So you can see that in *Forrester*, the Supreme Court is telling us that the *Browning* decision is not as compelling as it was for the 2 years before the *Forrester* case came before the Supreme Court." *Id.* at S639-40.

In the House, Representative Goodling, a veteran proponent of accountability legislation, placed into the record a memorandum from the Congressional Research Service that Mr. Goodling said "concluded that legislation allowing congressional employees to bring lawsuits in court would likely be upheld and does not pose a serious constitutional question." 141 Cong. Rec. H264.

This Court has taken a pragmatic approach to Speech or Debate issues. "Rather than giving the Clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that *realistically* threatens to control his conduct as a legislator." *Gravel*, 408 U.S. 618 (emphasis added).

Congress eliminated any role for the executive in enforcing the CAA. Having done so, Congress determined that giving important responsibility to the judiciary would not "realistically threaten[] to control [Members'] conduct as . . . legislator[s]."

The congressional view of the constitutionality of legislation affecting its own Members, while certainly not decisive, is entitled to deference: "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States v. Nixon*, 418 U.S. 683, 703 (1974).

With the CAA in particular, Congress acted after "weigh[ing] competing constitutional interests in an area in which it enjoys particular expertise," *McConnell v. Federal Election Commission*, 540 U.S. 93, 137 (2003), so again some measure of deference is due. Finally, the assessment that executive officials might be in a position to intimidate Members, but that judges would not, is a judgment that only Congress is qualified to make. It should be respected.

E. Both Approaches to Immunity in the Opinions Below Are Valid

The sole issue in this case is whether Speech or Debate immunity divests the district court of jurisdiction to consider Brad Hanson's complaint. Judges Randolph and Brown agreed for a unanimous court that "the Speech or Debate Clause does not bar jurisdiction in these cases" (*i.e., Hanson* and *Fields*). J.S. App. 27a (Randolph, J.); *see id.* at 57a (Brown, J.).

Judges Randolph and Brown disagreed, however, on the approach to be taken in resolving Speech or Debate issues under the CAA in the absence of *Browning*. Judge Randolph assumed that the defendant Offices could invoke the Speech or Debate privilege for all purposes, including the assertion of absolute immunity from suit, but "because neither of the cases before us rests on legislative acts, we have no basis for dismissing them." J.S. App. 31a (Tatel, J., concurring). Judge Randolph noted, however, that "[w]hen the Clause does not preclude suit altogether, it still 'protect[s] Members from inquiry into legislative acts or the motivation for actual performance of legislative acts.'" *Id.* at 21a-22a, *quoting Brewster*, 408 U.S. at 508.

Judge Brown believed that the defendant Offices "are not members of Congress entitled to invoke the Speech or Debate Clause, nor are they alter egos of members." S.J. App. 57a. For this reason, "the Speech or Debate Clause does not pro-

vide a basis for dismissing these actions; rather, it operates as an evidentiary protection for members of Congress and their aides who might be asked to provide evidence" in the cases. *Id.*

Both approaches to Speech or Debate immunity have merit, but appellee prevails if either one is upheld.

1. *This Case Does Not Involve a Legislative Act*

Judge Randolph examined the pleadings—specifically, Hanson's complaint—as the Court had in *Tenney*, 341 U.S. at 376, *Brewster*, 408 U.S. at 525, and *Doe v. McMillan*, 412 U.S. at 312, and determined that he had not "sought to predicate liability on protected conduct." S.J. App. 20a. That is, Hanson simply alleged that Senator Dayton discriminated against him because of his heart condition and he was also improperly denied overtime pay. *Id.* "In neither [*Hanson* nor *Fields*] is it 'necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation' of the Accountability Act." *Id., quoting Brewster*, 408 U.S. at 526. In short, Hanson's complaint does not challenge legislative acts, so "the Speech or Debate Clause does not bar jurisdiction." S.J. App. 27a.

2. *The Speech or Debate Privilege May Not Be Invoked by or on Behalf of a Member's Office*

Judge Brown, joined by Judges Sentelle and Griffith, viewed a Member's "employing office" as an administrative device to implement certain functions of the CAA, not as an "alter ego" of the Member entitled to assert legislative immunity. The language and structure of the Act, along with this Court's authority on "alter ego" status under the Speech or Debate privilege, support that conclusion.

Gravel held that a Member's aide was protected by the Speech or Debate privilege to the extent she was serving as

the Member's "alter ego" on legislative matters; *i.e.*, the Clause "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." 408 U.S. at 618. The CAA specifies that the "employing office" is to serve as the defendant in a civil action, 2 U.S.C. § 1408(b), and for congressional employees working for a Member, the employing office is the Member's office, *id.* at § 1301(9)(A). Appellant—the defendant Office of Senator Dayton—argues that it, like a Member's legislative aide, is the Senator's alter ego on legislative matters and hence is protected by the Speech or Debate privilege.

Judge Randolph accepted this premise, at least for the sake of argument. Judge Brown did not: the employing office "is not an alter ego of the member." J.S. App. at 46a. This means that there is "no reason to conclude that the employing office in an action brought pursuant to the Act is entitled to invoke the Speech or Debate Clause." *Id.* at 52a. And "[b]ecause appellants are not members of Congress, or alter egos of members, and therefore have no Speech or Debate Clause protection, the jurisdictional bar is not applicable." *Id.* at 53a (footnote omitted).

Judge Brown's argument is elegant and has more support than is mustered in her opinion. There are a number of factors that together show that a Member's office is a shell—a "legal fiction" in former Congressman Hyde's words[21]—and that a CAA suit is against Congress, just as a Title VII suit involving an executive branch agency is against the United

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[21] Former Representative Henry Hyde, who submitted an *amicus* brief below, characterized the "employing office"—or more precisely, the CAA's according this status to the personal office of a Member—as a "legal fiction," saying "[t]here is nowhere else in the law a legal entity known as a Member's 'office.'" *Amicus* Brief of Congressman Henry Hyde (Hyde *Amicus* Brief) at 10, No. 04-5315 (D.C. Cir.) (July 18, 2005).

States, even though the named defendant is the head of the agency. *See* 42 U.S.C. § 2000e-16(c).

First, the Member's office is defended by institutional counsel—in the Senate the Office of Senate Chief Counsel for Employment—in any judicial action brought under the CAA. Second, the Act defines "covered employee" as (among other things) "any employee of . . . the House of Representatives [or] . . . the Senate." 2 U.S.C. § 1301(3). This strongly suggests that—for purposes of the CAA—staffers on Capitol Hill work for either the House or the Senate, rather than for a particular employing office. This inference is buttressed by 2 U.S.C. § 1301(7), (8), which defines "employee of the House of Representatives" and "employee of the Senate" as workers paid centrally by the Clerk of the House or the Secretary of the Senate, respectively.

Third, and even more significant, 2 U.S.C. § 1311, which among other things specifies how Title VII is to be applied to the legislative branch, says that damages may be awarded as permitted by 42 U.S.C. § 1981a(b)(3)(D), "irrespective of the size of the employing office." 2 U.S.C. § 1311(b)(1)(B). Some statutory close order drill is required here. Damages are available under Title VII because of 42 U.S.C. § 1981a, which was added by the Civil Rights Act of 1991. Damage awards are capped, however, depending on the size of the employer, and the highest possible award is $300,000 against employers with more than 500 employees. 42 U.S.C. § 1981a(b)(3)(D). But CAA plaintiffs are eligible for $300,000 "irrespective of the size of the employing office."

In brief, the CAA treats all employees as if they worked for an employer with more than 500 employees. But that is true only if they really work for Congress, because most employing offices are considerably smaller. Judge Brown compared the employing office to a department in a large corporation, J.S. App. 47a, and that analogy is apt.

Fourth, under 2 U.S.C. § 1414, settlements do not become effective until approved by the Executive Director of the Office of Compliance. This is again reminiscent of the corporate setting in which EEO settlements negotiated by a department do not become final until approved by corporate headquarters.

Fifth, 2 U.S.C. § 1415 provides for payment of all CAA awards and settlements out of a special fund created specifically for this purpose. In this regard, the 1994 Senate report was careful to point out that "[n]othing in this Act authorizes [any officer or entity] . . . to direct that amounts paid for settlements or awards be paid from official accounts of the employing office." S.Rep. 103-397 at 29.

Sixth and finally, the bill reported in October 1994 by the Senate Committee on Governmental Affairs—which was "almost identical" to S. 2, which passed and became the CAA three months later—specified that the defendant in a civil action brought by a Senate employee would be the Senate, or the House if brought by a House employee, or the head of the employing entity if the civil action were brought by an employee elsewhere in the legislative branch. S.Rep. 103-397 at 27. It is simpler and promotes greater accountability to have the named Member's employing office be the defendant, as was done in S. 2 in January 1995. There is nothing in the record—zero—to indicate that the change in nomenclature signified a substantive difference.

There are many indicators, and they all point in the same direction. A lawsuit under the CAA is against the Congress. The employing office is a shell, a stand-in for Congress. It is certainly not the alter ego of a Member for any purpose, including assisting with legislation. And since only Members and their alter egos on legislation are protected by the Speech or Debate privilege, it may not be invoked for employing offices.

This approach would permit suits under the CAA to proceed, even if a personnel decision could be viewed as a legislative act. The Court has long recognized that even though Members of Congress cannot be sued for their legislative acts, it may still be possible for a plaintiff to secure relief for an invalid legislative act if it is implemented by a person who is not protected by the Speech or Debate Clause. So, even assuming Hanson's firing was a legislative act—and it was not—the appellant Office at most implemented the decision by processing the necessary paperwork and hence is subject to suit. The Court's precedent supports this approach.

In *Kilbourn v. Thompson*, the plaintiff sued the Sergeant-at-Arms of the House of Representatives and several House Members for false imprisonment, after being arrested and jailed by the Sergeant-at-Arms pursuant to a House resolution finding the plaintiff in contempt. The Court devoted much of its opinion deciding that the House lacked authority to issue the contempt order, but then held that the Members themselves were immune from suit under the Speech or Debate Clause. 103 U.S. at 200-05. But the Court allowed the suit to proceed against the Sergeant-at-Arms. *Id.* at 205.

Kilbourn has a modern counterpart in *Powell*, which contested the validity of a House resolution barring the seating of Representative Adam Clayton Powell. The Court dismissed the suit against the Members themselves, because there was no question that passing the resolution was a legislative act protected by the Speech or Debate Clause. As in *Kilbourn*, however, the Court held the resolution invalid and allowed the suit to proceed against those responsible for its implementation—the Clerk of the House, the Sergeant-at-Arms and the Doorkeeper. 395 U.S. at 506. *See also Dombrowski*, 387 U.S. at 84 (committee counsel was not immune from suit concerning an allegedly unlawful conspiracy with state officials to secure evidence by improper means).

In *Gravel*, the Court considered whether the Speech or Debate Clause protected a Member's aides and held that the Clause "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." 408 U.S. at 618. The Court distinguished *Kilbourn*, *Powell* and *Dombrowski*, saying that these cases did not hold that "immunity was unavailable to congressional or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection," *i.e.*, was not a legislative act. *Id.* at 620. In particular,

> In *Kilbourn*, the Sergeant-at-Arms was executing a legislative order . . . in [*Dombrowski v.*] *Eastland*, the committee counsel was gathering information for a hearing; and in *Powell*, the Clerk and Doorkeeper were merely carrying out directions. . . .
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> * * *
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> None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In *Kilbourn*-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So, too, in *Eastland*, as in this litigation, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen.

Id. at 620-21.

In short, the implementation of a legislative act—which is the most the Office did here—is not legislative in nature and is not protected by the Speech or Debate privilege. Judge

Brown's analysis has merit on a number of fronts, and if she is right, no further examination is needed. The Court need not reach Judge Brown's theory, however, because Hanson's firing was not a legislative act.

F. It Is Premature to Address the Precise Contours of the Evidentiary Privilege

The sole issue presented by this appeal is whether appellant is immune from suit. Indeed, the only reason the court below had jurisdiction to hear an appeal from a non-final order was because of the immunity gloss on the collateral order doctrine: "The denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

Judges Randolph and Brown agreed that appellant is not immune from suit and that the district court properly asserted jurisdiction. They also agreed that the Speech or Debate Clause would likely continue to play a role in the litigation because of its evidentiary privilege. Even in a situation with no immunity, it is still improper to ask a Member about legislative acts or their motivation. *Johnson*, 383 U.S. at 177; *Helstoski*, 442 U.S. at 487. In short, a CAA plaintiff may not seek to prove his case by quizzing a Member about legislative acts.

Congress itself reaffirmed this principle in the CAA by including section [illegible] U.S.C. § 1413, a savings provision specifying that the Act does not waive a Member's Speech or Debate privilege. But Congress agreed with *Forrester* and did not view routine employment decisions as legislative acts entitled to immunity. Instead, section 413 was aimed at preserving Members' evidentiary privilege, *i.e.*, to be able to refuse to answer questions about true legislative acts. For example, a Member could not be questioned about a vote on a

bill or a speech on the floor, no matter how probative that evidence might be for a plaintiff's claims.

There was no opinion for the D.C. Circuit on the proper way to treat issues of evidentiary privilege under the Speech or Debate Clause, as Judge Rogers, the fifth member of the opinion for the court on most issues, declined to concur on this one. *See* J.S. App. 29-30. She believed "the court need not address what happens when legislative acts arise as potential evidence in varying contexts in CAA litigation," and "[a]ttempts to signal the answers to such questions are fraught with problems." *Id.* at 29a.

Judge Tatel similarly felt that questions about the proper application of the evidentiary privilege will be "more easily answered after further factual development." J.S. App. 31a. Judge Tatel also noted that all members of the *en banc* court agreed that "the question of what precisely the Clause precludes is best resolved on a case-by-case basis." *Id.* "Because such determinations will necessarily be fact-bound, it is appropriate that we announce no blanket rule today," and instead allow "the district courts [to] develop the factual records." *Id.* at 35a.

It is sensible to defer making "blanket rules" concerning the application of the Speech or Debate Clause's evidentiary privilege to this case. No discovery has been taken, so such questions are premature. In any event, appellant seeks review only of the threshold issue of jurisdiction, which the court below unanimously—and correctly—decided against it.

It is unlikely that further litigation in this case will get anywhere near legislative acts, because appellant has already conceded that Hanson's firing was not related to his work on legislation. As noted in the Statement, the Office of Senator Dayton filed an answer to Hanson's complaint in district court, asserting that he was fired because he mismanaged the Health Care Help Line, which assisted constituents who

had problems with their health insurance carriers, HMO's or physicians.

The Help Line, although legitimate, was not legislative in character. The Line originated as a campaign asset during Senator Dayton's election campaign in 2000. Hanson designed and ran it, and it certainly was not a legislative activity before Senator Dayton was even elected. Nor was it thereafter.

Instead, the Health Care Help Line was among the "wide range of legitimate 'errands' performed for constituents" that are "political in nature rather than legislative." *Brewster*, 408 U.S. at 512. Indeed, the crux of appellant's defense appears to be that Senator Dayton did not know that Hanson needed heart surgery at the time he made the decision to fire him. See Br. App. 1a, ¶ 1. That defense has nothing whatever to do with legislative acts. This case poses no threat to legislative independence and is not barred by the Speech or Debate privilege.

II. THIS APPEAL SHOULD BE DISMISSED

Appellant says that section 412 of the CAA, 2 U.S.C. § 1412, which provides that "[a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this Act," authorizes a direct appeal to this Court from the decision of the D.C. Circuit. Appellee argued in the Motion to Dismiss or to Affirm that appellant did not have the right of direct appeal from a court of appeals to this Court—that such appeals could only come from district courts. Appellee also argued that the Office should have appealed to the Court from the district court's minute order denying the motion to dismiss.

The argument against appeals from federal appellate courts was based in part on the unlikelihood that Congress would authorize a direct appeal from a court of appeals so soon after abolishing most of the Court's appellate jurisdiction—including all direct appeals from courts of appeals—in Pub. L. 100-352, 102 Stat. 662 (1988). In fact, we were wrong. Research for this brief has revealed that Congress authorized a post-1988 appeal from a court of appeals in the Government Employee Rights Act (GERA), which was Title III of the Civil Rights Act of 1991. In particular, Congress provided for direct appeal from decisions of the Court of Appeals for the Federal Circuit on the constitutionality of certain provisions of GERA. *See* section 325(c) of GERA, *formerly* 2 U.S.C. § 1224(c). GERA was a predecessor of the CAA, so it is possible that Congress likewise intended to authorize appeals from decisions of courts of appeals in the Accountability Act, too.

Second, on the question whether the district court's minute order could be directly appealed, we believed that the court's order necessarily rejected the merits of appellant's argument, and that a rejection of the merits satisfied the criteria in 2 U.S.C. § 1412. This is problematic. In the absence of an opinion, it is impossible to know whether the district court denied appellant's motion simply because facts were in dispute, as opposed to an examination of the merits. *See* n.3 above. Perhaps more important, the decision of the D.C. Circuit shows that it is possible to address the merits of appellant's argument without satisfying the standards for direct appeal in 2 U.S.C. § 1412, especially since those criteria must be strictly applied. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 43 (1983) ("statutes authorizing appeals are to be strictly construed"). Quite simply, there is nothing in Judge Randolph's opinion for the court deciding "the constitutionality of any provision" of the CAA.

In sum, the district court's minute order was not subject to direct appeal, because the absence of an opinion makes it impossible to tell whether § 1412's standards are met. And since there could not have been a direct appeal from the district court, the remedies in *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389 (1982), do not apply.

Nor is direct appeal possible from the decision of the D.C. Circuit—not because appeals are no longer possible from judgments of circuit courts, but simply because the criteria of § 1412 are not satisfied. That means the appeal here should be dismissed.

Certiorari should not be granted, not only because experienced counsel deliberately opted for appeal, but principally because appellant does not meet the standards of the Court's Rule 10—there is no division in the circuits, and the D.C. Circuit was faithful to the Court's Speech or Debate Clause and related precedent. Still, certiorari is a much more flexible tool than the appeals process. If the Court desires to address the merits of this case, appellee believes that granting certiorari would be preferable to dealing with this case as an appeal, with the attendant risk that CAA discovery disputes with Speech or Debate overtones would be appealed. *See* Brief for the United States Senate as *Amicus Curiae* at 12.

III. THIS CASE IS NOT MOOT

Senator Dayton chose not to seek reelection. Now the Office of Senator Dayton argues that the Senator's voluntary departure from Congress moots this case and requires vacating all prior judicial decisions. This argument contravenes the language, structure and purpose of the CAA, as well as judicial precedent on abatement generally. *See Bastien v. Office of Senator Ben Nighthorse Campbell*, 2005 WL

3334359 (D.Colo. 2005) (rejecting claim of abatement after Senator Nighthorse Campbell left office).[22]

The expiration of a Member's term of office does not moot a case so long as there is a live dispute for which relief can be provided. In *Davis v. Passman*, for example, Congressman Passman was defeated for reelection in a primary in 1976, 442 U.S. at 230 n.1, three years before the Court affirmed the existence of a *Bivens*-style discrimination claim against him in federal court. Still, the Court saw the case as very much alive, because monetary damages were available: "since respondent is no longer a Congressman . . . equitable relief in the form of reinstatement would be unavailing. * * * For Davis, as for Bivens, 'it is damages or nothing.'" *Id.* at 245. *See also Powell v. McCormack*, 395 U.S. at 498 (claim for back pay meant that Adam Clayton Powell's lawsuit was not moot, even though his reelection resulted in his return to Congress).[23]

The parties contest Hanson's entitlement to back pay or damages, and appellant is vigorously represented by counsel provided by the Senate. If Hanson prevails, there is a fund available to satisfy the judgment. 2 U.S.C. § 1415. These are not the indicia of a moot case.

Abatement is an extreme measure resulting in the immediate cessation of all pending claims and requiring that prior judicial decisions be vacated. At common law, issues of abatement would arise when a necessary party to litigation

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[22] Appellant is wrong to suggest that sovereign immunity plays any role here: "Congress . . . unequivocally waived the sovereign immunity of a Member's personal office facing [CAA] allegations." J.S. App. at 11a.

[23] In a firing case, reinstatement is the only element of relief that ordinarily would be affected by a Member's departure from office. Long before Senator Dayton announced his decision not to run for reelection, Hanson stipulated that he was not seeking an order requiring his return to the job and would instead accept monetary relief. *See* JA 20.

ceased to exist, for instance, when a natural person died or when a corporation took the affirmative steps necessary to extinguish operations, such as filing articles of dissolution. Findings of abatement are now rare, because state laws routinely provide a mechanism for resolving pending litigation even where an individual dies or a corporation dissolves. *See, e.g., Melrose Distillers Inc. et al., v. United States*, 359 U.S. 271, 272 (1959) (dissolution of corporation did not abate Sherman Act prosecution). Similarly, lawsuits against public officials frequently raised issues of abatement until the rules of this Court (Rule 35.3) and the Federal Rules of Civil Procedure more broadly (Rule 25(d)) cured the problem by specifying that cases do not abate when officials leave public office. Instead, any successor to the office automatically is substituted as a defendant and the suit continues, unabated.[24]

When Congress creates a governmental instrumentality capable of being sued, abatement is accomplished *only* by an express act abolishing the defendant. *See Asociacion de Empleados del Area Canalera v. Panama Canal Comm'n*, 453 F.3d 1309, 1312 (11th Cir. 2006) ("On September 30, 2004, while Appellants' suit was pending, Congress passed a joint resolution that amended the Act and terminated the PCC and OTA as of October 1, 2004."); *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 636 (1949) (Congress expressly dissolved the Defense Supplies Corporation through a Joint Resolution); *Skolnick v. Parsons*, 397 F.2d

[24] Even where no successor to office can be found, cases do not ordinarily abate. For example, in *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 672 (U.S. 1996), the plaintiff (an independent contractor) sued alleging that his contract with the city to haul trash was terminated because of his protected First Amendment speech. During the appeal, "the Board members who were the original defendants in this suit subsequently resigned their positions on the Board, so in this Court, the Board was substituted for them as petitioner. See this Court's Rule 35.3." *Id.* The Court did not hold that the Board members' departure from office, without identified successors, resulted in abatement.

523, 524 (7th Cir. 1968) (the President's Commission on Law Enforcement and Administration of Justice "terminated by Presidential Order prior to the filing of the complaint."). In these circumstances, the intention to abolish is manifest in the statute or executive action. That is not true here.

Appellant assumes than when Senator Dayton left the Congress and closed his office door for the last time, the Office of Senator Dayton ceased to exist. But the Office is a term of art (Representative Fawell called the concept of employing office a "term of new art," 141 Cong. Rec. 1337), a "legal fiction" created expressly for purposes of the CAA. Hyde *Amicus* Brief at 10. Thus the Act must be examined to see if a Member's departure from Congress affects the Office's continued existence.

The CAA created the employing office as an instrumentality capable of being sued. 2 U.S.C. § 1408(b). The statute contains just one condition for establishing jurisdiction in federal court—that the employee's claim was timely submitted to an internal counseling and mediation procedure prior to filing suit. *Id.* at § 1408(a). The CAA does not state or in any way imply that jurisdiction is extinguished on the last day of a Member's term of office.

Similarly, there is nothing in the special judgment fund established by 2 U.S.C. § 1415 that says that the fund may not be used to satisfy judgments after a Member leaves office. Appellant refers to the Senate Handbook, but that volume sets forth procedures only for closing the Senators' Official Personnel and Office Expense Account. *See* 2 U.S.C. § 58c. If Congress had provided that CAA judgments were to be paid from that account, appellant would have a better case for mootness. But Congress did not, and it made sure the Members knew it. *See* S.Rep. 103-397 at 29.

We showed in Section I.E.2 above that a CAA suit is against Congress generally, just as a Title VII lawsuit by a federal employee is against the United States, even though the

statute requires that the agency head be named as the defendant. 42 U.S.C. § 2000e-16(c). This means that a particular Member's continued tenure in office is not a prerequisite to federal court jurisdiction.

Judge Brown commented below on the unique structure of the CAA:

> The personal office of a member . . . is not an independent legal entity, nor does it have any independent interests. It is not a person, nor a sovereign government, nor a branch of government, nor a chartered corporation, nor a trust, nor a partnership. It is an organizational division within Congress, established for Congress' administrative convenience, analogous to a department within a large corporation. Therefore, an employee in the personal office of a member is in truth an employee of Congress, as to whom the member (acting on behalf of Congress) has supervisory control.

J.S. App. 47a.

Counsel made the same mootness argument following the remand in *Bastien*, since Senator Nighthorse Campbell, like Senator Dayton here, had voluntarily relinquished his Senate seat. The district court analyzed the language, structure and underlying purpose of the CAA and ruled that claims under the CAA do not abate upon expiration of a Member's term:

> [t]he court must determine whether there is a party to respond to a judgment which might be entered in this case even though Senator Nighthorse Campbell no longer holds office. After reviewing the CAA, and studying its legislative history extensively, the Court finds that there is such a party. The CAA, along with its corresponding history, make clear that Congress is the party which must answer to claims filed thereunder, not the individual members. Thus, the fact that Senator Nighthorse Campbell is no longer in office is irrelevant.

2005 WL 3334359 at *3.

Adoption of appellant's argument on mootness would have harsh consequences. A Senator in the final months of his term could harass his staff with impunity, comfortable in the knowledge that no claim could be completed before he departed. Employees of Representatives would have no assurance that litigation—including appeals—would be finished before the Member left office. A Member in either House could pull the plug on a claim at any point by resigning, depriving the aggrieved employee of any hope of remedy. Committee staffers in contrast, would go to the head of the line, knowing that their claims—unlike those of their colleagues in Members' offices—would go to final judgment, even though Congress intended to treat its employees equally. *See, e.g.*, 141 Cong. Rec. S447 (Sen. Glenn).

In the absence of compelling evidence from the text of the CAA or its history, it is unreasonable to conclude that Congress wrote this landmark reform legislation in a way that would permit its Members easily to avoid responsibility for unlawful conduct. In fact, though, all indicators point in the direction of enhancing congressional accountability.

A lawsuit under the CAA is against the Congress. The employing office is a stand-in for Congress. This case is not moot.

IV. POSTSCRIPT

Concerned about the perverse implications of its position, appellant says there are some matters that even an employee with legislative duties may challenge under the CAA. The example is sexual harassment that progresses to the point of producing a hostile work environment. Brief for Appellant at 31-32. Appellant contrasts this type of unlawful employment practice with a "discriminatory termination," for which "the Speech or Debate Clause bars adjudication." *Id.* at 32 n.12.

But what if the hostile environment culminates in a discharge, as frequently happens? The Court has held that, in

this circumstance, the dismissal is a tangible employment action whose presence deprives the employer of an affirmative defense to the imposition of vicarious liability. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

A hostile work environment is a serious matter. A hostile environment culminating in a firing is doubly serious and results without more in vicarious liability for the employer. Yet appellant's theory would only provide protection from the less serious violation. A statutory interpretation with such anomalous consequences should be avoided.

The text, structure and history of the Congressional Accountability Act are clear, as are this Court's precedents. Federal courts have jurisdiction over all properly instituted CAA claims.

CONCLUSION

The appeal should either be dismissed or the judgment below affirmed. If the Court treats appellant's papers as a petition for certiorari, the petition should be denied. If the petition is granted, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

DOUGLAS B. HURON *
RICHARD A. SALZMAN
TAMMANY M. KRAMER
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Counsel for Appellee

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case No. 1:03CV01149 (RJL)

BRAD HANSON,

Plaintiff,

v.

OFFICE OF SENATOR MARK DAYTON

Defendant.

ANSWER TO COMPLAINT

The Office of Senator Mark Dayton, for its answer to the Complaint in the above-captioned matter, states as follows:

1. In response to paragraph 1 of the Complaint, the Office of Senator Mark Dayton admits only that Brad Hanson ("Mr. Hanson" or "Plaintiff") worked for Mark Dayton's 2000 Senate campaign and worked in the Office's Fort Snelling, Minnesota location after Mr. Dayton was elected to the Senate. The Office of Senator Mark Dayton denies each and every remaining allegation set forth in paragraph 1 of the Complaint. The Office of Senator Mark Dayton expressly denies that Mr. Hanson was terminated because he needed heart surgery or for any other health-related reason. When he terminated Mr. Hanson, Senator Dayton was completely unaware that he reportedly needed heart surgery. Mr. Hanson was terminated because of his poor job performance over an extended period of time.

Mr. Hanson did not fulfill his job obligations to help the people of Minnesota. His job responsibilities encompassed, among other things, issues that were at the heart of Senator

Dayton's constitutional obligation to represent his constituents, and Senator Dayton could not effectively meet those obligations when Mr. Hanson failed to perform his job. At the time Mr. Hanson was terminated, he had failed to process and otherwise respond to approximately 150 matters that constituents had brought to his attention. Those matters raised serious healthcare-related issues the constituents wanted and needed to have the Office of Senator Dayton address and resolve. Moreover, the concerns raised by constituents guide Senator Dayton in determining what legislation he should sponsor, support or oppose. In addition, Mr. Hanson left work in the middle of the afternoon when he should have been working. When he was in the office and should have been working, he was observed by staff members to be sleeping at his desk on more than one occasion; he was also observed watching non-Senate related television, including daytime soap operas and sports, with his feet propped on his desk, when he should have been working. That lack of commitment to Minnesota was unacceptable to Senator Dayton. In further response to paragraph 1 of the Complaint, the Office of Senator Mark Dayton expressly denies that Mr. Hanson was unaware that Senator Dayton was unhappy with his job performance. Beginning in December 2001 and consistently thereafter, Senator Dayton told Mr. Hanson that he showed a lack of initiative to increase public awareness of the availability of the Health Care Health Line ("HCHL"). Moreover, Senator Dayton instructed Mr. Hanson to implement a system to tabulate the number of HCHL cases, but Mr. Hanson adamantly resisted doing so, claiming that it was impossible.

In further response to paragraph 1 of the Complaint, the Office of Senator Mark Dayton states that when Mr. Hanson was hired, Senator Dayton was aware that Mr. Hanson claimed to have some heart condition. It is not credible that the Office would have terminated Mr. Hanson for a condition that Senator Dayton was aware of at the time Mr. Hanson was hired.

2. In response to paragraph 2 of the Complaint, the Office of Senator Mark Dayton states as follows. The Office of Senator Mark Dayton denies each and every allegation set forth in paragraph 2 of the Complaint except admits that Plaintiff purports to bring this lawsuit as he alleges. Article I, section 6, clause 1 of the U.S. Constitution provides absolute immunity to the Office of Senator Mark Dayton; therefore, this Court lacks subject matter jurisdiction of this action.

3. In response to paragraph 3 of the Complaint, the Office of Senator Mark Dayton states as follows. The Office of Senator Mark Dayton is without knowledge or information sufficient to allow it to admit or to deny the allegation that Plaintiff is a lifelong resident of Minnesota. The Office of Senator Mark Dayton admits that Plaintiff has known Senator Dayton for many years, their families have been friendly, and Plaintiff is a "covered employee" within the meaning of 2 U.S.C. § 1301(3). The Office of Senator Mark Dayton denies each and every remaining allegation of paragraph 3 of the Complaint and expressly denies that Mr. Hanson was unlawfully fired.

4. The Office of Senator Mark Dayton admits the allegations set forth in paragraph 4 of the Complaint except denies that the Office is a personal office of Senator Dayton; rather the Office is a United States government office, paid for by the taxpayers of the United States of America.

5. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 5 of the Complaint except admits that Plaintiff joined Mark Dayton's Senate campaign in July 2000 and that during the campaign Mr. Hanson was one of those who ran the HCHL, an advocacy program conceived and initiated by candidate Dayton that assisted people having difficulties with health insurance carriers, HMO's and Medicare, and that Mr. Hanson did a good job at the outset and that Senator Dayton complimented him for that work. The Office of Senator Mark Dayton expressly denies that Mr.

Hanson designed the HCHL program; rather, the idea for the HCHL was entirely and originally Senator Dayton's.

6. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 6 of the Complaint except admits that Plaintiff began working for the Office of Senator Mark Dayton in January 2001 at an annual salary of $45,000, that Plaintiff's title when he began his employment with the Office of Senator Mark Dayton was Office Manager/ Caseworker, that Plaintiff assisted in setting up Senator Dayton's Minnesota state offices in Fort Snelling, Thief River Falls, and Ely, Nowabik, and that Plaintiff oversaw the transition of HCHL to the Office of Senator Mark Dayton. The Office of Senator Mark Dayton expressly denies that Mr. Hanson was ever denied any overtime pay.

7. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 7 of the Complaint except admits that Plaintiff worked in Senator Dayton's Fort Snelling office and that Mr. Hanson did a good job at the outset for which Senator Dayton complimented him.

8. The Office of Senator Mark Dayton is without knowledge or information sufficient to allow it to admit or to deny the allegations set forth in paragraph 8 of the Complaint.

9. Except as expressly admitted or otherwise averred herein, the Office of Senator Mark Dayton denies each and every allegation set forth in paragraph 9 of the Complaint. The Office of Senator Mark Dayton admits that Senator Dayton planned to and did go to the Fort Snelling office on July 3, 2002. Prior to that meeting, Senator Dayton had resolved to terminate Mr. Hanson, and, therefore, a principal purpose for this meeting was to terminate Mr. Hanson. The Office of Senator Mark Dayton also admits that Mr. Hanson told Senator Dayton's scheduler that Mr. Hanson wanted to make sure that he was on Senator Dayton's schedule for a July 3 meeting and that Mr. Hanson told co-workers that he

needed heart surgery. Although Mr. Hanson discussed his need for surgery with some co-workers and told them he wanted to meet with Senator Dayton on July 3, at no time did he mention to those co-workers or anyone else that he was going to tell Senator Dayton that he needed surgery. In fact, Mr. Hanson told his co-workers that the reason he wanted to meet with Senator Dayton on July 3 was to discuss the problems with the HCHL program. At no time prior to his termination did Mr. Hanson or anyone else tell Senator Dayton that Mr. Hanson needed heart surgery. In fact, when Senator Dayton terminated Mr. Hanson, he was completely unaware that Mr. Hanson needed heart surgery. Senator Dayton is and always has been a strong proponent of assisting individuals with their health-related problems. It would be against all his principles to terminate an employee because the employee needs surgery. In further responding to paragraph 9 of the Complaint, the Office of Senator Mark Dayton states that it is without knowledge or information sufficient to allow it to admit or to deny the allegations regarding Plaintiff's wanting to tell Senator Dayton personally about his need for an operation.

10. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 10 of the Complaint except admits that Plaintiff met with Senator Dayton on July 3, 2002, at his Fort Snelling office and that at a subsequent staff meeting Senator Dayton informed the staff that Plaintiff's employment with the Office had ended. The July 3 meeting began with Mr. Hanson launching into a tirade against other office staff. Mr. Hanson told Senator Dayton that there were serious problems in the office, and Mr. Hanson blamed them on two other supervisory staff, and he called for their termination. Senator Dayton then informed Mr. Hanson that, prior to the meeting, Senator Dayton had concluded that the HCHL's problems were caused by Mr. Hanson's poor performance and that Mr. Hanson, not other supervisors, had to leave the Office. Senator Dayton told Mr. Hanson that he was therefore

terminated, or he could choose to resign. Only after Mr. Hanson had been terminated and at the conclusion of this conversation, did he inform Senator Dayton that he was going to the Mayo Clinic the following week; Mr. Hanson offered no other information about his health, nor, out of respect for Mr. Hanson's privacy, did Senator Dayton ask.

11. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 11 of the Complaint except admits that Plaintiff was kept on the payroll through September 30, 2002, was taken off the payroll on September 30, 2002, and that Matt McGowan, the Office Manager, spoke with him by telephone on or about July 17, 2002, to inform him that his last day on the payroll would be September 30, 2002. Mr. McGowan also told Mr. Hanson that Senator Dayton would personally pay one year of Mr. Hanson's healthcare premium and his wife's family health club membership, which Senator Dayton had previously gifted to her for her healthcare treatment.

12. The Office of Senator Mark Dayton is without knowledge or information sufficient to allow it to admit or deny the allegations set forth in paragraph 12 of the Complaint.

13. The Office of Senator Mark Dayton denies the allegations set forth in paragraphs 13 and 14 of the Complaint.

14. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 15 of the Complaint, except the Office of Senator Mark Dayton admits that Plaintiff engaged in counseling under 2 U.S.C. § 1402 and mediation under 2 U.S.C. § 1403.

15. For its answer to paragraph 16 of the Complaint, the Office of Senator Mark Dayton incorporates paragraphs 1-14 of this Answer as if set forth here at length.

16. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 17 of the Complaint.

17. For its answer to paragraph 18 of the Complaint, the Office of Senator Mark Dayton incorporates paragraphs 1-14 of this Answer as if set forth here at length.

18. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 19 of the Complaint.

19. For its answer to paragraph 20 of the Complaint, the Office of Senator Mark Dayton incorporates paragraphs 1-14 of this Answer as if set forth here at length.

20. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 21 of the Complaint.

21. The Office of Senator Mark Dayton denies the allegations set forth under Plaintiff's "Request for Relief," including, but not limited to, subparagraphs numbered 1-7, except the Office of Senator Mark Dayton admits that Plaintiff requests the relief set forth under "Request for Relief," and the Office of Senator Mark Dayton expressly denies that Plaintiff is entitled to any of the relief requested or any other relief.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE
(Lack of Subject Matter Jurisdiction)

22. The Office of Senator Mark Dayton has absolute immunity under the Speech or Debate Clause of the U.S. Constitution (U.S. Const., art. I, § 6, cl. 1), and the Office of Senator Mark Dayton has not, and does not, waive that immunity. Rather, the Office of Senator Mark Dayton expressly preserves its Speech or Debate immunity.

SECOND AFFIRMATIVE DEFENSE
(Lack of Subject Matter Jurisdiction)

23. To the extent Plaintiff asserts in this action any claim for which he failed timely to file a request for counseling or a

request for mediation and/or any claim that was not raised in his request for mediation, such claims are barred due to a failure to exhaust administrative remedies. *See* 2 U.S.C. §§ 1401, 1402, 1403, 1404 and 1408.

THIRD AFFIRMATIVE DEFENSE
(Lack of Subject Matter Jurisdiction)

24. To the extent Plaintiff alleges that the Office of Senator Mark Dayton committed illegal acts other than those prohibited by the Congressional Accountability Act ("CAA"), 2 U.S.C. §§ 1301-1438, the Court lacks jurisdiction over his claims.

FOURTH AFFIRMATIVE DEFENSE
(Failure to State a Claim for Relief)

25. The Complaint fails to state a claim upon which relief can be granted.

FIFTH AFFIRMATIVE DEFENSE
(Statute of Limitations)

26. To the extent Plaintiff did not file a request for counseling with the Office of Compliance within 180 days of the alleged violation(s) of the CAA, his claim with respect to such alleged violation(s) is barred by the statute of limitations set forth in section 402 of the CAA, 2 U.S.C. § 1402.

SIXTH AFFIRMATIVE DEFENSE
(Injury Caused by Others)

27. To the extent Plaintiff has suffered any injury or damages, such injury or damages were not caused by the acts or omissions of the Office of Senator Mark Dayton, but by the acts or omissions of Plaintiff or of others.

SEVENTH AFFIRMATIVE DEFENSE
(Non-discriminatory Reasons)

28. The Office of Senator Mark Dayton's decisions with respect to Plaintiff's employment were based on legitimate, non-discriminatory reasons.

EIGHTH AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

29. On information and belief, Plaintiff has failed to mitigate his damages, and to the extent of such failure to mitigate, any damages awarded to Plaintiff should be reduced accordingly.

NINTH AFFIRMATIVE DEFENSE
(Bad Faith)

30. Having brought this action in bad faith, Plaintiff must reimburse the Office of Senator Mark Dayton for its attorneys' fees and costs.

TENTH AFFIRMATIVE DEFENSE
(Exclusive Statutory Remedy)

31. The exclusive remedy for the claims asserted by Plaintiff is provided by the CAA. To the extent Plaintiff seeks relief that is not available under the CAA, the Court is without jurisdiction to grant the relief requested.

ELEVENTH AFFIRMATIVE DEFENSE
(Performance of Duties)

32. The Office of Senator Mark Dayton has performed fully any and all contractual, statutory and other duties to Plaintiff, and therefore Plaintiff is estopped to assert any claim or cause of action against the Office of Senator Mark Dayton.

TWELFTH AFFIRMATIVE DEFENSE
(Frivolous)

33. The allegations and claims asserted in the Complaint have always been and continue to be frivolous.

THIRTEENTH AFFIRMATIVE DEFENSE
(Estoppel)

34. Any of the conduct of the Office of Senator Mark Dayton that is alleged to be unlawful was taken as a result of conduct by Plaintiff, and Plaintiff therefore is estopped to assert any cause of action against the Office of Senator Mark Dayton.

FOURTEENTH AFFIRMATIVE DEFENSE
(Unclean Hands)

35. To the extent Plaintiff has unclean hands, he is barred from equitable relief in this action.

FIFTEENTH AFFIRMATIVE DEFENSE
(Mixed Motive)

36. Even if the Office of Senator Mark Dayton took adverse action against Plaintiff in part because of an illegitimate motive, which it did not, the Office of Senator Mark Dayton would not be liable under the CAA or would have only limited liability if the Office of Senator Mark Dayton would have taken the same action even in the absence of the illegitimate motive.

WHEREFORE, the Office of Senator Mark Dayton, prays that Plaintiff take nothing by his Complaint, that the Complaint be dismissed in its entirety, that the Office of Senator Mark Dayton be awarded its attorneys' fees and costs, and that the Court award to the Office of Senator Mark Dayton such other relief as it deems just and proper.

Dated: September 21, 2004

Respectfully submitted,

/s/ Jean M. Manning
Jean M. Manning
Senate Chief Counsel for Employment
D.C. Bar No. 439942

Toby R. Hyman
Senate Senior Counsel for Employment
Appearance pursuant to LCvR 83.2(e)

Office of Senate Chief Counsel
for Employment
Senate Hart Building, Room 103
Washington, D.C. 20510
Telephone: (202) 224-5424
Facsimile: (202) 228-2557

Attorneys for Defendant,
The Office of Senator Mark Dayton

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No. 06-618

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR APPELLANT

JEAN M. MANNING
Senate Chief Counsel for Employment
Counsel of Record
TOBY R. HYMAN
CLAUDIA A. KOSTEL
DAWN BENNETT-INGOLD
OFFICE OF SENATE CHIEF COUNSEL FOR EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
Phone: (202) 224-5424
Facsimile: (202) 228-2557

THOMAS C. GOLDSTEIN
WILLIAM F. ALLEN
CHRISTOPHER M. EGLESON
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
Phone: (202) 887-4000
Facsimile: (202) 887-4288

Counsel for Appellant

APPEAL DOCKETED NOVEMBER 3, 2006
JURISDICTION POSTPONED JANUARY 19, 2007

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I. THIS CASE IS PROPERLY BEFORE THIS COURT[1]

A. CAA § 412 Applies To The Appeal In This Case

A statute providing for appeal to this Court from a judgment "upon the constitutionality" of a provision of a statute, such as CAA § 412, 2 U.S.C. § 1412, encompasses appeal from a judgment upon the constitutionality of a provision of the statute, as applied. See *United States v. Eichman*, 496 U.S. 310, 313 (1990) (appeal pursuant to 18 U.S.C. § 700(d) from judgment upon the constitutionality of Flag Protection Act of 1989, as applied); cf. *Fleming v. Rhodes*, 331 U.S. 100, 104 (1947) (where statute provided for direct appeal to this Court from a decision "against the constitutionality" of a statute, "there is an appeal from an order that invalidates, as unconstitutional, a statute as applied"). The argument below of the Office of Senator Mark Dayton ("Dayton Office") that the Speech or Debate Clause deprives the court of jurisdiction of Hanson's suit squarely placed in issue the constitutionality of CAA § 408, 2 U.S.C. § 1408, as applied in this case. Thus, the judgment below is not only a ruling on the scope of the Speech or Debate Clause but also a judgment on the constitutionality of CAA § 408, *as applied*.[2]

The legislative history supports that Congress intended this Court to decide appeals from rulings challenging the CAA on Speech or Debate Clause grounds. When Congress added CAA § 413, 2 U.S.C. § 1413, to S. 2, the bill that would become the

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[1] The Office of Senator Mark Dayton responds to the arguments of Appellee Brad Hanson ("Hanson"); the United States Senate ("Senate Amicus"); Congressmen Frank and Shays; and AARP.

[2] Accepting this appeal will not open the appeal floodgates. See Senate Amicus at 12. A district court ruling on a Member's assertion of Speech or Debate Clause privilege in response to discovery would not implicate any provision of the CAA and, therefore, would not be a ruling "upon the constitutionality of any provision of this Act."

CAA, expressly preserving the Speech or Debate Clause privileges, Congress simultaneously added CAA § 412 to ensure that any doubts regarding the applicability of the privileges would be decided quickly and definitively by this Court.[3]

B. The Dayton Office Properly Appealed This Case To The D.C. Circuit

The Dayton Office and Hanson agree that the district court's minute order could not have been appealed directly to this Court. See Hanson Br. at 42; but see Senate Amicus at 12-14. In its Motion to Dismiss, the Dayton Office argued that Speech or Debate Clause immunity protects personnel actions taken against employees whose job duties directly relate to the due functioning of the legislative process and that Hanson's duties were such duties. (Def.'s Mot. Dismiss and Stmt. of P. & A. in Supp., No. 03-CV-1149, Dkt. Entry #12 (Sept. 12, 2003).) As such, in denying the motion to dismiss, the court could have concluded that Hanson's duties were not directly related to the due functioning of the legislative process -- a decision that would not have been upon the constitutionality of the statute. Because the district court's minute order provided no rationale (J.S. App. 58a-59a), the Dayton Office did not know and could not have known whether the decision was

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[3] Compare S. 2, 104th Cong. (1995), the bill that became the CAA, with H.R. 1, 104th Cong. (1995) (the version of the bill passed by the House before passing S. 2); see also the statement Senator Dole made at the time the appeal provision for the Government Employee Rights Act of 1991 ("GERA"), the predecessor to the CAA, 2 U.S.C. § 1224(c) (repealed 1995), was introduced: "[T]here are still some lingering doubts as to the constitutionality of these [judicial review] provisions," and "[t]hese doubts should be resolved by the best arbiter of constitutional issues, the Supreme Court itself, and as quickly as possible." 137 Cong. Rec. S15500 (daily ed. Oct. 30, 1991).

upon the constitutionality of the statute. There was no such uncertainty in *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389, 389-90 (1982), which therefore has no application to this appeal.

C. The Petition For A Writ Of Certiorari Is Proper

This action is also reviewable by this Court by writ of certiorari pursuant to 28 U.S.C. § 1254(1) because the D.C. Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court" and "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

II. THIS CASE IS MOOT

Abrogating the sovereign immunity of congressional employing offices, Congress in the CAA specified that the "employing office" -- and only the employing office -- shall be the defendant in a suit under the statute. 2 U.S.C. § 1408. The "employing office" is "the personal office of a Member of the House of Representatives or of a Senator." 2 U.S.C. § 1301(9)(A).

Congress's design was both conscious and careful. Prior versions of the bill, which were not enacted, instead denominated as the defendant "the Congress" or "the Senate." Appellant Br. at 20-21. One version notably would have permitted suit "against the Congress *or* the congressional employer." H.R. 2099, 103d Cong. § 2(c)(1) (1993) (emphasis added).

The "employing office" is a formal entity, not an artificial construct. The CAA may have established that term of art, but the term nonetheless describes an entity that previously existed:

employing offices were "employing authorities that *exist[ed]* in the Legislative Branch" prior to the enactment of the CAA. H.R. Rep. No. 103-650, pt. 2, at 13 (1994) (emphasis added). The employing office comes into existence when the Member is elected and dissolves when the Member leaves.[4]

The employing office (rather than, for example, the Senate) makes the employment decisions -- hiring, firing, promoting, and the like -- that are subject to suit under the statute. Thus,

> [i]ndividuals do not, in fact, work for "Congress" in a generic sense, rather they are employed by one of a number of distinct employing offices -- each of which is considered a separate entity -- whether that entity is the office of an individual Senator or Member of Congress . . . .

H.R. Rep. No. 103-650, pt. 2, at 13 (1994) (accompanying H.R. 4822). Each employing office has, for example, its own employee policy manual. The employing office notably has (as Hanson and Senate Amicus point out) its own counsel -- the Office of the Senate Chief Counsel for Employment ("SCCE") -- which operates independent from the counsel to the Senate itself, maintaining distinct client relationships and privileges that the Senate has always respected. "[E]ach of the 180 offices of the Senate is an individual client of the SCCE, and each office maintains an attorney-client relationship with the SCCE." *Legislative Branch Appropriations for Fiscal Year*

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[4] Notably, once the Member leaves office no entity exists to control the litigation on behalf of the defendant. There literally is no party with the power and responsibility to determine what defenses should be interposed, what discovery should be taken, what motions should be filed, and the like.

2000, Hearings Before a Subcomm. of the Comm. on Appropriations, 106th Cong., S. Hrg. 106-33 (1999), at 251. Contra Hanson Br. at 46; Senate Amicus at 17 (seeking to characterize an employing office as an administrative unit of the Senate). Accordingly, since the inception of the SCCE, Senate leadership has never requested or received confidential or privileged information from the SCCE about CAA cases; has not tried to participate in counseling or mediation; has never directed or participated in litigation strategy; and has never reviewed, read, approved, or been a signatory to a settlement agreement.

Once a Member leaves office, the corresponding employing office ceases to exist. For example, no office exists that could hire or fire employees, or incur any debts; the office space must be vacated, and the office receives no mail. Appellant Br. App. 6a-7a (employees taken off the payroll on January 2 of the year Member's term expires). The only office expenses that can be paid after the Senator leaves office are those incurred prior to the close of the office. These payments are made from the office's appropriated funds and only to the extent that any balance of such funds remains. Moreover, the office has no further responsibilities under the CAA, nor could it continue to comply with the Act. See, *e.g.*, S. Res. 242, 104th Cong., § 825.312(d) (1996) (stating that FMLA rights, including the right to restoration, cease once the employment relationship terminates). At that point, the office no longer meets the definition of an "employing office" because it is not the "personal office" of any member of Congress. Further, the CAA definition of "employing office" does not mention former Representatives or former Senators, see 2 U.S.C. § 1301(9)(A), and could not because former Members do not have personal offices in the legislative branch. In contrast, the statute expressly covers "former employee[s]." See 2 U.S.C. § 1301(4).

When a defendant ceases to exist and there is no successor, the case abates. *Def. Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634 (1949). In this case, Hanson's lawsuit names as the only defendant a literally non-existent entity that has no successor: the Dayton Office. When the Senator's term of office expired, the office simply ceased to exist, and the case abated.

Hanson notes that "[f]indings of abatement are now rare" because state laws and court rules (such as this Court's Rule 35.3) "cured the problem." Hanson Br. at 44. Appellant's Brief at 19 n.6 identified numerous federal statutes providing for succession and non-abatement of actions. But the relevant point is that Congress did not do so with respect to the CAA. That contrast is striking.

Moreover, in determining whether an action abates, the question is not whether some entity exists that would pay a judgment. Rather, the question is whether a defendant exists; the straightforward answer is "no." E.g., *Asociacion de Empleados del Area Canalera v. Panama Canal Comm'n*, 453 F.3d 1309, 1314 n.6 (11th Cir. 2006) (despite the continued availability of funds, suit could not continue because the defendants were defunct).[5] Further, contrary to Hanson's argument (Hanson Br. at 43), neither *Powell v. McCormack*, 395 U.S. 486, 498 (1969), nor *Davis v. Passman*, 442 U.S. 228, 229 (1979), is on point because at least two adverse parties existed in each case.

The Dayton Office is not extant simply because attorneys continue to defend "vigorously" the suit. For a suit to continue, there must be a party. See *Ellis v. Dyson*, 421 U.S. 426, 434

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[5] Notably, 2 U.S.C. § 1415(c) states that payments for "violations of section 201(a)(3)" must be paid by employing offices' appropriated funds.

(1975) (case or controversy requires extant parties throughout the litigation); *Shaffer v. Howard*, 249 U.S. 200, 201 (1919) (case mooted when defendant no longer in office and there was no statutory successor). Certainly in almost every abatement case, a lawyer continues to litigate the question of abatement. And when a defendant dies, a lawyer, after all, files a "suggestion of death." In this case, the SCCE has not continued to pursue this litigation based on the view that the employing office continues to exist; to the contrary, SCCE does not believe that it has a client in this litigation. But until this Court reaches that conclusion, counsel's obligation to the Court requires SCCE's continued participation.

Any doubt that only the employing office is the defendant in an action under the CAA and that this case has abated for that reason is resolved by the fact that the statute's private right of action is a waiver of the government's sovereign immunity from suit. That waiver must be "strictly observed." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981). Congress specified that the suit authorized against the employing office under the CAA "shall not constitute a waiver of sovereign immunity for any other purpose." 2 U.S.C. § 1413. Permitting this suit to go forward would require interposing some new defendant -- presumably, the Senate itself. But Congress has not waived the Senate's immunity from suit. See Appellant Br. at 20-21.

Further, the employing office is not merely a nominal entity, such that its dissolution is irrelevant. As noted, Congress took care to waive sovereign immunity specifically and exclusively with respect to the employing office. Hanson argues (Hanson Br. at 34) that the staff covered by the CAA are employees of the Senate or House, not the employing office. That is untrue and irrelevant: the legal issue is the status of the defendant, not the plaintiff. The further fact that "institutional counsel" represent the employing office (Hanson Br. at 34)

actually supports the finding of abatement, for it is notably the SCCE (not Senate Counsel) that is the employing office's counsel and indeed has a distinct attorney-client relationship with each office.[6] Finally, the fact that the Office of Compliance must authorize payment on settlements from the Treasury (Hanson Br. at 35) does not compel a contrary conclusion. The employing office (not the Senate) negotiates any settlement and must agree to it; the Office of Compliance (which is itself not an organ of the Senate) plays a purely administrative role and has promptly processed payment on every settlement to which Senate employing offices have agreed.

Substituting the Senate as the defendant would raise perplexing questions given Congress's political environment. For example, if a Senator from one party were sued while the other party controlled the Senate, the Senate and the Senator's office could have conflicting interests in litigation strategy and settlements. The Senate could settle the case for a significant sum and neither deny wrongdoing nor make the settlement agreement confidential. These political problems would be exacerbated if the Senator were running for reelection or for higher office.

Finally, Hanson argues that abatement is harsh. That is intrinsic to the doctrine; by definition, its application in a case in which a defendant ceases to exist extinguishes the plaintiff's right of action. But Hanson's contention that abatement would eviscerate the statutory scheme is wrong. Since the passage of

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[6] The extraordinary consequence of the position of Hanson and Senate Amicus that the actual employer and defendant in CAA actions is Congress or the Senate would presumably be that individual Senate employing offices would lose their attorney-client privilege with the SCCE, contrary to the express statements and practice in the Senate since the SCCE's inception.

the CAA, abatement has arisen only twice. The median tenures of Senators and Representatives are eleven and nine years, respectively. The CAA provided Hanson with a right to seek a remedy for alleged discrimination; indeed, he pursued counseling and mediation and, had he pursued his claim under 2 U.S.C. § 1405, his case would have been resolved before the employing office ceased to exist. But in any event, this is a question for Congress, which is fully empowered to provide for a successor to the employing office if it deems such a course appropriate. It is not for this Court to interpose that decision. See, *e.g.*, *United States ex rel. Bernardin v. Butterworth*, 169 U.S. 600, 605 (1898) (recommending Congress provide for non-abatement of actions against heads of departments).

III. THE SPEECH OR DEBATE CLAUSE BARS COURT JURISDICTION OF THIS ACTION

The Speech or Debate Clause does not bar CAA plaintiffs from seeking relief under the CAA. It affects only the forum in which some employees can sue. Those employees can file complaints with the Office of Compliance, 2 U.S.C. § 1405(a), receive a full hearing before an experienced arbitrator or retired judge, and receive all relief allowed by the statute, *id.* § 1405(c) and (g), because the Office of Compliance is part of the legislative branch, 2 U.S.C. § 1381(a). The forum restriction prevents judicial intrusion into the legislative function. A Member would have no legislative independence if a court were to hire and fire his alter egos directly; the Member's independence would be equally imperiled if a court accomplished the same thing, one step removed, by second guessing the Member's termination of his alter egos.[7]

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[7] The Judicial Conference report to Congress rejected application of CAA laws to the judicial branch because "[t]he judicial branch is a separate and co-equal branch of government under the United States Constitution.

A. Reliance On *Forrester* Is Misplaced

Hanson's and Amici's reliance on *Forrester v. White*, 484 U.S. 219 (1988), is misplaced. About the only thing *Forrester* and this case have in common is that both involved a termination. While the *Forrester* test balances considerations of public policy against the effect of exposure to liability, 484 U.S. at 224, "balancing plays no part" in determining the applicability of Speech or Debate Clause immunity. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 510 n.16 (1975). Thus, the "Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U.S. Const., Art. I, § 6, cl. 1." *Forrester*, 484 U.S. at 224.

Moreover, the rationales underlying common law judicial immunity and constitutional Speech or Debate Clause immunity are not the same. Judicial immunity "protect[s] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants." *Id.* at 225. Speech or Debate Clause immunity is based on "the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch," and "the desire to protect legislative independence." *United States v. Gillock*, 445 U.S. 360, 369 (1980). Accordingly, while Speech or Debate Clause immunity

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It must retain autonomy with respect to internal administration . . . ." See JUDICIAL CONFERENCE OF THE U.S., STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, at 4 (Dec. 1996). The report explained that the preservation of an independent judiciary relies, in part, on "judicial autonomy in hiring law clerks and other judicial staff." *Id.* Requiring, for example, the payment of overtime wages to court employees would result in the hiring of fewer people, in turn disrupting the functioning of the judicial branch. *Id.* at 17.

protects all acts within the legislative sphere,[8] judicial immunity of state judges protects judicial independence and impartiality in adjudicating cases and, as such, does not protect all acts within the judicial sphere.[9]

B. The Speech Or Debate Clause Bars Court Jurisdiction Of This Suit Notwithstanding That The Defendant Is The Office Of A Member

The Speech or Debate Clause protects all acts within the legislative sphere irrespective of who the named defendant is.[10] Otherwise, none of the protections of the Speech or Debate

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[8] The Court has defined acts within the legislative sphere in various ways: (1) the due functioning of the legislative process, see *United States v. Brewster*, 408 U.S. 501, 512 (1972), and (2) an "integral part of the deliberative and communicative processes," by which Members perform their constitutional duties. *Gravel v. United States*, 408 U.S. 606, 625 (1972). The only acts the Court has found not protected by Speech or Debate Clause immunity are "the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress," *Brewster*, 408 U.S. at 512; accepting a bribe for a promised legislative act, *id.* at 526-27; attempting to influence the Department of Justice, *United States v. Johnson*, 383 U.S. 169, 172 (1966); private republication of classified report, *Gravel*, 408 U.S. at 625; and public republication of defamatory statements, *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979).

[9] *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), is also inapt. There, the only issues were whether local officials had legislative immunity and whether introducing, voting for, and signing an ordinance were legislative acts. Notably, the Court did not apply a *Forrester* analysis. Moreover, *Bogan* did not involve an employee whose duties were part of the due functioning of the legislative process.

[10] As such, although the Speech or Debate Clause mentions only Senators and Representatives, "prior cases have plainly not taken a literalistic approach in applying the privilege." *Gravel*, 408 U.S. at 617.

Clause would be afforded: (i) preventing intimidation of legislators and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181 (1966); (ii) preventing the judiciary from intruding into the legislative sphere, and judging a Member's motive as to acts within the legislative sphere, *Eastland*, 421 U.S. at 502, 509; (iii) ensuring that legislators are not diverted from their constitutional duties, *id.* at 503; and (iv) "support[ing] the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal," *Coffin v. Coffin*, 4 Mass. (1 Tyng) 1, 27 (1808). "[J]udicial power [would] still [be] brought to bear on [a] Member[] of Congress and legislative independence [would be] imperiled." *Eastland*, 421 U.S. at 503. Thus, the immunity applied to a Senate subcommittee, which is an employing office under the CAA, see *id.* at 501, and to House functionaries who were not staff of a Member or Committee, see *Doe v. McMillan*, 412 U.S. 306, 312 (1973); see also *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (state committee and mayor acting in a legislative capacity covered); *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 733-34 (1980) (state supreme court acting in a legislative capacity protected).[11]

Further, Senate Amicus's assertion that Congress has waived the Speech or Debate Clause immunity of all Senate offices (Senate Amicus at 27 n.23) is inconsistent with Speech or Debate Clause jurisprudence in several respects. First, Speech or Debate Clause immunity must be expressly waived, see *United States v. Helstoski*, 442 U.S. 477, 490-91 (1979), and the CAA does not do so. Second, "the 'privilege is not a badge . . . , but an expression of a policy designed to aid in the

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[11] Although *Tenney* and *Consumers Union* involved state actors in § 1983 cases, the Court applies Speech or Debate Clause analysis in determining state legislators' immunity in § 1983 cases.

effective functioning of government.'" *Gravel v. United States*, 408 U.S. 606, 617 (1972) (quoting *Barr v. Mateo*, 360 U.S. 564, 572-73 (1959)). Thus, the issue is not who was sued. The issue is whether the case can be tried without a court questioning a legislative act or the motive for it. Third, the privilege "is not so much the privilege of the house . . . as of each individual member . . . . [H]e cannot be deprived [of it], by a resolve of the house, or by an act of the legislature." *Coffin*, 4 Mass. (1 Tyng) at 27. Indeed, it would be a disservice to the Constitution and the history of the Speech or Debate Clause for the Clause to apply only when either house wants it to; the Clause protects independence, not conformity. The Member "does not hold this privilege at the pleasure of the house; but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature." *Id.*

Finally, Hanson asserts that even if Senator Dayton's personnel decisions with respect to Hanson are within the legislative sphere, the Dayton Office's implementation of those decisions is not protected if the decisions are unlawful.[12] Hanson Br. at 36. The cases he cites, *Kilbourn v. Thompson*, 103 U.S. 168 (1880), *Powell v. McCormack*, 395 U.S. 486 (1969), and *Dombrowski v. Eastland*, 387 U.S. 82 (1967), do not support his argument because those decisions were not based on whether the defendant was a Member, but on whether the challenged actions were within the legislative sphere. In both *Kilbourn* and *Powell*, the resolutions were void as to substance because the directive of the resolutions exceeded the Members' constitutional authority. Therefore, the suits could proceed against the functionaries because their implementation

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[12] Speech or Debate Clause immunity applies to an act that is within the legitimate legislative sphere even if the act is illegal. See *Eastland*, 421 U.S. at 510.

of those resolutions was not within the legitimate legislative sphere. In *Dombrowski*, the case could proceed against the subcommittee's counsel only with respect to conduct that was not within Congress's legislative sphere -- his alleged involvement in a conspiracy with a state legislative committee to seize documents on "*its*" behalf. 387 U.S. at 84 (emphasis added). In contrast, when the counsel acted on behalf of the U.S. Senate subcommittee, Speech or Debate Clause immunity applied. See *id.* at 83-85; see also *Gravel*, 408 U.S. at 619-20.

Unlike *Kilbourn* and *Powell*, Senator Dayton's actions did not exceed his constitutional authority. Therefore, even if one were to view the personnel actions as the Dayton Office's implementation of Senator Dayton's directives, the Speech or Debate Clause would still immunize them.

C. The Scope Of The Speech Or Debate Clause Is A Judicial Determination

The Court should not defer to Congress's alleged conclusion that the Speech or Debate Clause does not bar CAA cases (see Hanson Br. at 21-31; Senate Amicus at 28-29) because (1) resolution of this issue requires constitutional interpretation, which is solely within the purview of the courts and (2) Congress never determined that CAA cases were not barred by the Speech or Debate Clause.

The scope of the Speech or Debate Clause is an issue of constitutional interpretation, which rests solely with the courts. See *Board of Trustees v. Garrett*, 531 U.S. 356, 365 (2001) ("it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees"); *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("'[i]t is emphatically the province and duty of the judicial department to say what the law is.'") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137,

177 (1803)) (alteration in original). "Our system of government 'requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch,'" *Nixon*, 418 U.S. at 704 (quoting *Powell*, 395 U.S. at 549), so this Court has not deferred to the Senate's interpretation of the Speech or Debate Clause, see, *e.g.*, *Hutchinson v. Proxmire*, 443 U.S. 111, 113 (1979) (concluding that Speech or Debate Clause did not protect actions of the Senator even though the amicus brief filed by the Senate in that case argued otherwise).[13]

Further, Congress never concluded that the Speech or Debate Clause does not bar CAA actions.[14] Legislative history demonstrates Members' on-going separation of powers concerns with applying employment laws to Congress. Senators Ford, Heflin, Rudman and Stevens cosponsored an amendment to the proposed Government Employee Rights Act of 1991 ("GERA"), the predecessor to the CAA, providing that employment claims against the Senate would be addressed by an internal Senate office, not by the courts. S. Amend. 2112,

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[13] *McConnell v. FEC*, 540 U.S. 93 (2003), and *Rostker v. Goldberg*, 453 U.S. 57 (1981), state the general rule that Congress is given deference in areas where it has special expertise. *McConnell*, 540 U.S. at 137-38 (effect of contribution limits on the political process); *Rostker*, 453 U.S. at 64 (military). The case herein presents a much different issue. As noted, supra p. 13, Congress cannot decide when Speech or Debate Clause immunity applies; rather, the Member can assert his immunity "even against the declared will of the house . . . [and over] an act of the legislature." *Coffin*, 4 Mass. (1 Tyng) at 27. Congress and an individual Member can have conflicting interests with respect to asserting the privilege, as this case demonstrates.

[14] Senate Amicus's statement of the intent of CAA statutory language is not evidence of the entire Congress's intent at the time the CAA was passed. Moreover, fifty-five of the Senators who voted on the CAA in 1995 are no longer members of Congress.

101st Cong. (1990); see 136 Cong. Rec. S9342 (daily ed. July 10, 1990). Senator Ford explained: "[T]he Senate must be aware of creating potential conflicts with article I, section 6, clause 1 of the Constitution . . . ." *Id.* He noted that suits in federal court "could lead to the very 'questioning in another place' of Member actions that the Constitution attempted to guard against." *Id.* Likewise, Senator Stevens stated that a personnel decision regarding "personal assistants and policy advisors is integral to our functioning as legislators, and is therefore protected by the speech or debate clause." 137 Cong. Rec. S15385 (daily ed. Oct. 29, 1991). In the 102d Congress, with respect to a proposal for adjudicating claims challenging congressional personnel actions in court or before an executive branch administrative agency, then-Majority Leader Mitchell, a former federal judge, stated: "[T]his is the most blatantly, flagrantly, obviously unconstitutional proposal that I have seen since I have been in the Senate." *Id.* at S15359. The proposed amendment was defeated by a 61-38 vote. See *id.* at S15361. Regarding an amendment providing that cases would be adjudicated by an internal hearing board selected by a legislative office, Senator Mitchell explained, "Because of the 'speech and debate' clause prohibition which limits the reach of the Judiciary into the operations of a Senator's own office or committee, the independent hearing board is the trier of fact rather than [the Judiciary]." *Id.* at S15372-73. Similarly, in 1993, while commenting on her years of work on similar but unsuccessful proposed legislation, Congresswoman Schroeder stated, "[O]ne thing that we have learned since 1976 in working way back with Father Dryinan [sic], who is a great constitutional scholar, . . . if you are going to have a review and have it be constitutional, you probably can't go to the Federal courts, most constitutional scholars tell us." *Application of Laws & Administration of the Hill: Hearings Before the J. Comm. on the Org. of Cong.*, 103d Cong., S. Hrg. 103-115 (1993) at 4.

To address these concerns in the proposed CAA, Senator Mitchell asked Senator Glenn, as chair of the Governmental Affairs Committee, to "find a bipartisan solution" that would address Members' concerns. 141 Cong. Rec. S447 (daily ed. Jan. 5, 1995). On January 5, 1995, the House passed H.R. 1 and referred it to the Senate. This version of the bill was not acceptable to the Senate, which substituted its new draft of the bill, S. 2, for H.R. 1. See 141 Cong. Rec. S918 (daily ed. Jan. 12, 1995). While H.R. 1 did not contain § 413 or any similar language, S. 2 did contain § 413. S. 2, 104th Cong. (1995). In fact the only difference between H.R. 1 and S. 2 that addressed the Members' concerns about the principle of separation of powers is the addition of § 413. S. 2 passed and became law, the CAA, on January 23, 1995. 141 Cong. Rec. D72 (daily digest Jan. 23, 1995).

This legislative history confirms the clear statutory language -- Congress never determined that the Speech or Debate Clause did not bar court jurisdiction of any CAA case.[15] Rather, Congress passed the statute with the understanding that the Court would not allow a CAA case to proceed in violation of the Speech or Debate Clause.

---

[15] The CRS memorandum Representative Goodling placed in the record, and which Hanson cites (Hanson Br. at 30), states:

> Staffs of Members are so essential to the functioning of the legislative process that under *Gravel* they are entitled to the same speech or debate immunity that the Members have. . . . [T]he [Speech or Debate] clause could very well protect the Members' discretion in choosing to hire or to keep or not keep any person they want on their staffs.

141 Cong. Rec. H265 (daily ed. Jan. 17, 1995).

D. Hanson's Suit Is Jurisdictionally Barred

Section 413 of the CAA preserves the "privileges" under the Speech or Debate Clause -- both the immunity from suit and testimonial privilege. 2 U.S.C. § 1413. Accordingly, the Speech or Debate Clause bars court jurisdiction of CAA cases that are predicated on a legislative act, or would require questioning of a legislative act or the motivation for the act, or would require a Member to answer -- in terms of defending himself -- for a legislative act and/or his motive for the act. See Appellant Br. at 25-27.

Application of this principle to Hanson's Fair Labor Standards Act claim bars court jurisdiction of that claim because adjudication of that claim would require questioning in detail Hanson's day-to-day duties and his performance of those duties, including whether his work was of substantial importance to the management or operations of the Dayton Office and the extent to which he exercised discretion and independent judgment in the performance of his job duties. See Appellant Br. at 40-41. Because Hanson's job duties were part of the legislative process, see below and Appellant Br. at 5, 38-40, such questioning would constitute questioning legislative acts.

Further, application of this principle to CAA discrimination claims would bar court jurisdiction of a case brought by an employee whose duties are part of the due functioning of the legislative process, unless the challenged action is beyond the apparent needs of the due functioning of the legislative process. That is so because managing an employee whose duties are part of the due functioning of the legislative process is itself part of the due functioning of the legislative process. See Appellant Br. at 28-32. Application of this rule bars court jurisdiction of Hanson's termination claims.

First, Hanson's job duties were part of the due functioning of the legislative process. See Appellant Br. at 38-40. He worked on "issues that were at the heart of Senator Dayton's constitutional obligation to represent his constituents . . . ." Hanson Br. App. 1a-2a ¶ 1. Hanson acted as Senator Dayton's representative to learn, among other things, "their (i) opinions about whether Senator Dayton should support or oppose certain legislation and (ii) suggestions regarding legislation Senator Dayton should introduce." J.S. App. 68a ¶ 6. "The information Mr. Hanson gathered from constituents, which was passed on to Senator Dayton, helped shape the Senator's legislative agenda and assisted him in representing Minnesotans." J.S. App. 68a ¶ 6. "Based on concerns constituents voiced to Mr. Hanson, he presented ideas to Senator Dayton that directly caused Senator Dayton (i) to initiate and to sponsor legislation . . . and (ii) to initiate a [Senate] hearing . . . ." J.S. App. 68a ¶ 6. Hanson was one of a few staff members who planned the committee hearing, "decided on its issues, selected hearing witnesses, and prepared questions that Senator Dayton asked at the hearing." J.S. App. 73a ¶ 14. Throughout his employment by the Dayton Office, Hanson's job included identifying opportunities for legislative initiatives. See J.S. App. 76a, 80a. Thus, Hanson was Senator Dayton's second self -- assisting the Senator to perform his constitutional duties. Second, Hanson's termination was not beyond the apparent needs of the due functioning of the legislative process. It was part of the due functioning of Senator Dayton's legislative process because the process functioned only if Senator Dayton selected alter egos. As such, the termination was a legislative act protected by the Speech or Debate Clause. Because Hanson's challenge to his termination is predicated on his termination and would necessarily require questioning his termination and/or the motivation for his termination, the Speech or Debate Clause bars court jurisdiction of his discrimination claims.

Moreover, the Speech or Debate Clause would bar court jurisdiction of Hanson's discrimination claims if the Court holds that the Clause bars jurisdiction of discrimination claims only where the challenged personnel action relates to the employee's performance of legislative duties. See Appellant Br. at 32-33. Hanson was terminated for his poor performance as head of the Health Care Help Line. For example, Hanson had ignored 150 constituent matters that provided information to Senator Dayton of constituents' concerns and "guide[d] [him] in determining what legislation he should sponsor, support or oppose." Hanson Br. App. 2a. Senator Dayton's performance of his constitutional duties was impeded by Hanson's failure to perform his job. See Hanson Br. App. 2a. Hanson's challenge to his termination could not be adjudicated without questioning his performance of his job duties within the legislative sphere and/or without requiring Senator Dayton to answer -- in terms of defending himself -- for a legislative act, i.e., Hanson's performance of his duties within the legislative sphere. Accordingly, the Speech or Debate Clause bars court jurisdiction of Hanson's discrimination claims.

* * * * *

For the foregoing reasons and those stated in the Dayton Office's opening brief, the Court should accept jurisdiction of this appeal pursuant to CAA § 412, dismiss the case as moot, or, alternatively, reverse the judgment of the court of appeals and remand with instructions to dismiss as jurisdictionally barred.

Respectfully submitted,

JEAN M. MANNING
Senate Chief Counsel
for Employment
Counsel of Record
TOBY R. HYMAN
CLAUDIA A. KOSTEL
DAWN BENNETT-INGOLD
OFFICE OF SENATE
CHIEF COUNSEL FOR
EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
Phone: (202) 224-5424
Facsimile: (202) 228-2557

Counsel for Appellant

THOMAS C. GOLDSTEIN
WILLIAM F. ALLEN
CHRISTOPHER M. EGLESON
AKIN GUMP STRAUSS HAUER
& FELD LLP
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
Phone: (202) 887-4000
Facsimile: (202) 887-4288

APRIL 2007

2/27/07

(12)

No. 06-618

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

JEAN M. MANNING*
Senate Chief Counsel for Employment
TOBY R. HYMAN
CLAUDIA A. KOSTEL
DAWN BENNETT-INGOLD
OFFICE OF SENATE CHIEF COUNSEL FOR EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
Phone (202) 224-5424
Facsimile (202) 228-2557

Counsel for Appellant

DOUGLAS B. HURON*
RICHARD A. SALZMAN
HELLER, HURON, CHERTKOF, LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, D.C. 20036
Phone (202) 293-8090
Facsimile (202) 293-7110

Counsel for Appellee

* Counsel of Record

APPEAL DOCKETED NOVEMBER 3, 2006
JURISDICTION POSTPONED JANUARY 19, 2007

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

03-CV-1149

BRAD HANSON
v.
OFFICE OF SENATOR
MARK DAYTON

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
05/29/2003	1	COMPLAINT against OFFICE OF SENATOR MARK DAYTON (Filing fee $150.), filed by BRAD HANSON.(nmw,) (Entered: 05/30/2003)
		* * * * *
09/12/2003	12	MOTION to Dismiss *and Statement of Points and Authorities in Support of Its Motion to Dismiss* by OFFICE OF SENATOR MARK DAYTON. (Attachments: # 1 Exhibit A to Brief-Excerpts from Annals of Congress# 2 Declaration of Marc Kimball# 3 Exhibit 1 to Decl.-Plaintiff's May 2001 Self Evaluation# 4 Exhibit 2 to Decl.-Plaintiff's Winter 2001 Self

		Evaluation# 5 Exhibit 3 to Decl.-Memo w/recommendations for addressing ambulance reimbursement problems # 6 Exhibit 4 to Decl.-August 2001 Doyle article# 7 Exhibit 5 to Decl.-Announcement Legislation# 8 Proposed Order) (Manning, Jean) (Entered: 09/12/2003)
		* * * * *
10/03/2003	15	Memorandum in opposition to motion re 12 filed by BRAD HANSON. (Attachments: # 1 # 2)(Huron, Douglas) (Entered: 10/03/2003)
		* * * * *
10/20/2003	18	REPLY to opposition to motion re 12 *Motion to Dismiss* filed by OFFICE OF SENATOR MARK DAYTON. (Manning, Jean) (Entered: 10/20/2003)
10/30/2003	19	NOTICE by BRAD HANSON *of Stipulation to Accept Front Pay in Lieu of Reinstatement* (Salzman, Richard) (Entered: 10/30/2003)
		* * * * *
09/07/2004		MINUTE ORDER denying 12 Motion to Dismiss by OFFICE OF SENATOR MARK DAYTON. Signed by Judge Richard J. Leon on 09/07/2004. (lcrjl1,) (Entered: 09/07/2004)

* * * * *

09/21/2004	22	NOTICE OF APPEAL as to Order on Motion to Dismiss by OFFICE OF SENATOR MARK DAYTON. Filing fee $ 0.00. (rje,) (Entered: 09/22/2004)

* * * * *

10/31/2006	25	NOTICE OF APPEAL to the United States Supreme Court as to Minute Order on Motion to Dismiss by OFFICE OF SENATOR MARK DAYTON. Filing fee $ 0.00. Fee Status: No Fee Paid. Parties have been notified. (jf,) (Entered: 11/07/2006)

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

04-CV-5335

BRAD HANSON
v.
OFFICE OF SENATOR
MARK DAYTON

RELEVANT DOCKET ENTRIES

DATE	DOCKET ENTRY
9/24/04	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Off Senator Dayton. [850364-1] (jth) [04-5335]
	* * * * *
4/29/05	PER CURIAM ORDER, In Banc, filed [891498] that No. 04-5335, Hanson v. Dayton be removed from the court's 5/11/05 oral argument calendar [891498-1]. No. 04-5315, Fields v. Johnson and No. 04-5335, Hanson v. Dayton are to be heard together on a date in the next term by the court sitting en banc. The parties will be notified by separate order of any additional briefing and oral argument date. Before Judges Ginsburg, Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland

and Roberts. [Entry date: 4/29/05] [04-5315, 04-5335] (lej) [04-5315 04-5335]

* * * * *

6/21/05 PER CURIAM ORDER, In Banc, filed [901450] that the parties and amici curiae while not otherwise limited, address the following issues in their briefs: (1) Whether the individual Speech or Debate Clause immunity of a Member of Congress Bars suit under the Congressional Accountability Act of 1995, 2 U.S.C. Sections 1301-1438, by a former high level aide against the Member's Office; and (2) Whether Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923 (D.C. Cir. 1086) (holding that Speech or Debate Clause immunity extends to a Member's personnel decisions involving high level aides who assisted a Member in performing legislative acts) is still good law. See Gross v. Winter, 876 F.2d 165, 170 (D.C. Cir. 1989) (recognizing there "is questionability tension" between Forrester v. White, 484 U.S. 219 (1988) and Browning). See also Bastien v. Office of Senator Ben Nighthorse Campbell, 390 F.3d 1301, 1318 (10th Cir. 2004) (rejecting the approach adopted in Browning that Speech or Debate Clause immunity depends on whether the employee's duties were "integral to the legislative process"). Before Judges Ginsburg, Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Roberts. [Entry Date: 6/21/05] [04-5315, 04-5335] (lej)
[04-5315 04-5335]

7/11/05 BRIEF filed by Appellant Off Senator Mark [906302-1]. Copies: 25. Certificate of personal service date 7/11/05. (sha) [04-5335]

7/11/05 JOINT APPENDIX filed by Appellant Off Senator Mark [906303-1]. Copies: 25. Certificate of personal service date 7/11/05. (sha) [04-5335]

7/11/05 ADDENDUM TO BRIEF lodged by Appellant Off Senator Mark [906305-1]. Copies: 25. Certificate of personal service date 7/11/05. (sha) [04-5335]

* * * * *

7/22/05 CLERK'S ORDER filed [907680] granting motion for leave to file addendum to appellant's brief filed by Off Senator Mark [906307-1] Directing Clerk to file the lodged addendum [906305-1]. [Entry Date: 7/22/05] (cwc) [04-5335]

* * * * *

8/12/05 BRIEF filed by Appellee Brad Hanson [912602-1]. Copies: 25. Certificate of service date 8/12/05. (mam) [04-5335]

9/2/05 REPLY BRIEF filed by Appellant The Office of Senator Mark Dayton [918601-1]. (Copies: 30). Certificate of service by hand delivery dated 9/2/05. (jth) [04-5335]

* * * * *

10/6/05 CLERK'S ORDER filed [923625] that these cases be set for oral argument on Wednesday, November 30, 2005, at 9:30 a.m. before the en banc court. [923625-1] [Entry Date: 10/6/05] [04-5315, 04-5335] (lej) [04-5315 04-5335]

* * * * *

11/30/05 ORAL ARGUMENT HELD before Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Brown, Griffith . . (set) [04-5335]

12/5/05 LETTER filed by Appellee Brad Hanson pursuant to FRAP 28j advising of additional authorities [935951-1]. Certificate of service date 12/5/05. (cwc) [04-5335]

12/12/05 LETTER filed by Appellant Off Senator Mark in response to appellee's letter filed pursuant to FRAP 28j advising of additional authorities [937294-1]. Certificate of service date 12/12/05. (cwc) [04-5335]

* * * * *

8/18/06 JUDGMENT that the Speech or Debate Clause does not bar jurisdiction in these cases and the judgments are affirmed for the reasons in the accompanying opinion. Before Judges Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland,* Brown, Griffith, Kavanaugh.* (Circuit Judges Garland and Kavanaugh did not participate) [Entry Date: 8/18/06] [04-5315, 04-5335] (mcm) [04-5315 04-5335]

8/18/06	IN BANC OPINION filed [986878] (28 pgs) for the Court by Judge Randolph, CONCURRING IN PART OPINION (3 pgs) filed by Judge Rogers, CONCURRING OPINION (5 pgs) filed by Tatel, CONCURRING OPINION (23 pgs) filed by Judge Brown [04-5315, 04-5335] (mcm) [04-5315 04-5335]

* * * * *

10/19/06	MANDATE ISSUED to Clerk, District Court [998741-1] (mcm) [04-5335]
10/31/06	NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT filed by Appellant Off Senator Mark [1003217-1]. Certificate of service date 10/31/06. (smc) [04-5335]

* * * * *

Notation Pursuant to Clerk's Guide for Counsel

The following opinion, judgment, and order have been omitted in printing this joint appendix because they appear at the following pages in the appendices to the Jurisdictional Statement.

Minute Order of the United States District Court for the District of Columbia, dated September 7, 2004 ..... 58a

Opinion of the United States Court of Appeals for the District of Columbia Circuit, dated August 18, 2006 ..... 1a

Judgment of the United States Court of Appeals for the District of Columbia Circuit, dated August 18, 2006 ..... 60a

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

BRAD HANSON 457 Upton Avenue South Minneapolis, MN 55405	)	
Plaintiff,	)	Case Number 1:03CV01149
v.	)	JUDGE: Richard J. Leon
OFFICE OF SENATOR MARK DAYTON SR-346, Russell Senate Office Building Washington, DC 20510	)	DECK TYPE: Employment Discrimination DATE STAMP: 05/29/2003
Defendant.	)	

[FILED: MAY 29, 2003]

COMPLAINT FOR RELIEF FROM UNLAWFUL EMPLOYMENT PRACTICES

1. Brad Hanson served with distinction in Mark Dayton's campaign for the Senate in 2000 and, after Senator Dayton was elected, as his Minnesota Office Director. The Senator often praised Hanson's work. But on July 3, 2002, Senator Dayton fired Hanson -- without warning -- after learning that he needed heart surgery that would require him to be out of the office. That was unlawful.

Jurisdiction

2. This is an action under the Congressional Accountability Act, 2 U.S.C. §§ 1301 et seq., seeking damages and other relief for violations of the Family and Medical Leave Act, 29 U.S.C. §§ 2611 et seq., the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., and the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. This Court has jurisdiction under 2 U.S.C. § 1408(a). Venue lies in this District under 2 U.S.C. § 1404(2).

Parties

3. Plaintiff Brad Hanson is a lifelong resident of Minnesota. He has known Mark Dayton for many years, and their families have been friendly. Until his unlawful firing, Hanson was employed by the defendant Office of Senator Mark Dayton. Hanson is a "covered employee" under 2 U.S.C. § 1301(3).

4. Defendant Office of Senator Mark Dayton (the Office) is Senator Dayton's personal Senate office. The Office is plaintiff Hanson's "employing office" under 2 U.S.C. § 1301(9)(A).

Factual Background

5. Brad Hanson joined Mark Dayton's Senate campaign in July 2000. Hanson designed and ran an advocacy program, the Health Care Help Line, which offered assistance to people having difficulties with their health insurance carriers, HMO's or physicians. The program was extraordinarily effective, both substantively and as a political asset during the campaign. As a result, Senator-elect Dayton publicly praised Hanson on

election night and said that he wanted Hanson to be with him as long as he held office.

6. In January 2001, Hanson began working for the defendant Office of Senator Mark Dayton, at an annual salary of $45,000. Hanson's title was State Office Manager, and he was instrumental in setting up the Senator's three local offices in Minnesota, in Ft. Snelling, Thief River Falls and Biwabik. Hanson also oversaw the transition of the Health Care Help Line to Senator Dayton's personal Senate office. Hanson's heavy workload entailed 60-hour weeks for several months and also considerable overtime thereafter. He was never paid for this overtime, however, even though his job duties did not qualify him as an employee who was exempt from overtime payments under the Fair Labor Standards Act.

7. Hanson worked in Senator Dayton's Ft. Snelling office. On several occasions, the Senator complimented him for his work, and he was often asked to handle delicate or thorny issues. Hanson's effectiveness was recognized in January 2002 when he received a salary increase of $5,000, as well as a bonus.

8. Early in 2002, Hanson began experiencing cardiac arrhythmia. He consulted a physician, who advised him that a surgical procedure, called a coronary ablation, was required. The procedure would only involve a short hospitalization, but a recovery period of two to three weeks would likely be needed.

9. Hanson wanted to tell Senator Dayton personally about his need for this operation, and he scheduled a brief meeting with the Senator on July 3, 2002 when he was going to be in the Ft. Snelling office where Hanson worked. Before July 3, Hanson told other staff members about his need for heart surgery.

10. Hanson met with Senator Dayton at the Ft. Snelling office on July 3, 2002, as scheduled. The meeting had not gone on for more than five minutes when the Senator abruptly told Hanson, "You're done." He did not explain why. A short time later, Senator Dayton informed the staff in the Ft. Snelling office that Hanson was leaving. Again, he gave no explanation.

11. At the meeting on July 3, 2002, Senator Dayton told Hanson that he should no longer report to the office but should instead go on medical leave. On July 17 Matt McGowan, Senator Dayton's Washington Office Manager, called Hanson at home and informed him that he would be terminated as of September 30. Hanson's last day on the payroll was September 30, 2002.

12. Hanson's heart surgery was performed following his termination from the payroll. The operation was successful, and Hanson fully recovered.

13. Before his summary firing on July 3, 2002, Hanson was given no warning that his job was in jeopardy. On the contrary, his work had been praised, and there was no basis for the termination. Senator Dayton fired Hanson because he needed to be out of the office to recover from heart surgery, in violation of the Family and Medical Leave Act, and because the Senator erroneously perceived Hanson to be disabled, in violation of the Americans with Disabilities Act. In addition, the failure to compensate Hanson for the overtime he worked violated the Fair Labor Standards Act.

14. The actions of Senator Dayton as described herein are the actions of the defendant Office. The Office's conduct has caused plaintiff Hanson to suffer both monetary and non-monetary losses. Hanson's monetary losses include loss of salary and other compensation, both past and future, and loss

of overtime payments. His non-monetary losses include emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life.

15. All prerequisites to suit under the Congressional Accountability Act have been satisfied. In particular, plaintiff Hanson has completed both counseling under 2 U.S.C. § 1402 and mediation under 2 U.S.C. § 1403.

COUNT ONE
FAMILY AND MEDICAL LEAVE ACT

16. Paragraphs 1-15 are realleged.

17. Plaintiff Hanson is an "eligible employee" under the Family and Medical Leave Act, as defined in 2 U.S.C. § 1312(a)(2)(B). The Office's conduct as described herein, including the firing of plaintiff Hanson, constituted a violation of the Family and Medical Leave Act, as applied to Congress by 2 U.S.C. §§ 1302(a)(5), 1312.

COUNT TWO
AMERICANS WITH DISABILITIES ACT

18. Paragraphs 1-15 are realleged.

19. The Office's conduct as described herein, including the firing of plaintiff Hanson, constituted a violation of the Americans with Disabilities Act, as applied to Congress by 2 U.S.C. §§ 1302(a)(3), 1311(a)(3), (b)(3).

COUNT THREE
FAIR LABOR STANDARDS ACT

20. Paragraphs 1-15 are realleged.

21. The Office's conduct as described herein, including the failure to pay plaintiff Hanson for working overtime, constituted a violation of the Fair Labor Standards Act, as applied to Congress by 2 U.S.C. §§ 1302(a)(1), 1313.

REQUEST FOR RELIEF

Plaintiff requests that this Court:

1) reinstate plaintiff in his position with the Office, together with full back pay and related benefits, or alternatively, award plaintiff front pay in lieu of reinstatement, together with full back pay and related benefits;

2) award plaintiff liquidated damages, as authorized by the Family and Medical Leave Act and the Fair Labor Standards Act;

3) award plaintiff compensatory damages, as authorized by 42 U.S.C. § 1981a for violations of the Americans with Disabilities Act;

4) enjoin defendant from retaliating against plaintiff for pursuing this action;

5) award plaintiff his costs and reasonable attorneys' fees;

6) award plaintiff prejudgment interest on all monetary sums awarded;

7) award such other relief as the Court deems just.

JURY DEMAND

Plaintiff requests trial by jury.

/s/ Richard Salzman
Richard A. Salzman 422497
Douglas B. Huron 89326
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, NW
Suite 412
Washington, DC 20036
(202) 293-8090

Attorneys for plaintiff

Notation Pursuant to Clerk's Guide for Counsel

The following declaration and accompanying exhibits have been omitted in printing this joint appendix because they appear at the following pages in the appendices to the Jurisdictional Statement.

Declaration of Marc Kimball, dated
September 10, 2003 ..... 66a

Exhibit 1 to Declaration - Hanson's May 2001
Self Evaluation 74a

Exhibit 2 to Declaration - Hanson's Winter 2001
Self Evaluation 78a

Exhibit 3 to Declaration - Memorandum Re: Ambulance
Problems in Minnesota 82a

Exhibit 4 to Declaration - August 2001 Article
by O.J. Doyle - Bill Announcement 87a

Exhibit 5 to Declaration - August 2001 Announcement
of Ambulance Legislation 88a

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

BRAD HANSON	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 03-1149
	)	(RJL)
OFFICE OF SENATOR	)	
MARK DAYTON	)	
	)	
Defendant.	)	

DECLARATION OF BRAD HANSON

1. I joined Mark Dayton's Senate campaign in July 2000. I designed and ran an advocacy program, the Health Care Help Line, which offered assistance to people having difficulties with their health insurance carriers, HMO's or physicians.

2. In January 2001, I began working as Senator Dayton's State Office Manager in Minnesota. I set up the Senator's three offices in the state, in Ft. Snelling, Thief River Falls and Biwabik, and I oversaw the transition of the Health Care Help Line to the Senate office.

3. In the first quarter of 2001, about 90 percent of my time was spent on administrative matters in connection with setting up the Senator's three offices in Minnesota. By May 2001, when I filled out the job evaluation form that is attached to the motion to dismiss filed by the defendant Office of

Senator Dayton, about one-third of my time was devoted to administrative work as State Office Manager, and about two-thirds relating to constituent services, mostly involving the Health Care Help Line. About a year later, in the spring of 2002, Marc Kimball gave some of my routine administrative duties (such as ordering supplies) to another employee, so I could devote more of my time to the Health Care Help Line.

4. I have read the description of my duties in Senator Dayton's motion to dismiss. That description exaggerates my role in legislation. I was never a legislative aide and rarely participated in meetings in which legislation was discussed. Overall, I estimate that I did not spend more than five percent of my time on the type of legislative duties described in Senator Dayton's motion.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge, information and belief.

Date: 10/2/03 /s/ Brad Hanson

Brad Hanson

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

BRAD HANSON	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 03-1149
	)	(RJL)
OFFICE OF SENATOR	)	
MARK DAYTON	)	
	)	
Defendant.	)	

PLAINTIFF'S STIPULATION TO ACCEPT FRONT PAY IN LIEU OF REINSTATEMENT

In its reply brief in support of its motion to dismiss, the Office of Senator Mark Dayton (Senator Dayton) says that plaintiff Brad Hanson would be entitled to reinstatement were he to prevail, but that reinstatement would not be an appropriate remedy here. Therefore, the Senator argues, Hanson's case should be thrown out. See Reply at 14.

This argument is a non sequitur and is also flawed in other respects. Even in the private sector, a plaintiff who is unlawfully fired does not have an automatic right to reinstatement. Rather he is entitled to be made "whole." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) ("[i]t is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination"). "Make whole" relief may, in the court's discretion, include reinstatement. See § 706(g) of Title VII,

42 U.S.C. § 2000e-5(g). But "[c]ourts [have] recognized that reinstatement [is] not always a viable option, and that an award of front pay as a substitute for reinstatement in such cases [is] a necessary part of the 'make whole' relief mandated by Congress and by this Court in Albemarle." Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 850 (2001).

In Pollard, the Supreme Court noted approvingly that "the federal courts consistently have construed § 706(g) as authorizing front pay awards in lieu of reinstatement." Id. at 853 n.3. And the Court observed that courts had, among other circumstances, found "front pay . . . appropriate given substantial animosity between parties where 'the parties' relationship was not likely to improve, and the nature of the business required a high degree of mutual trust and confidence.' " Id. at 850 (citation omitted). This is exactly the situation posited by Senator Dayton.[1]

Senator Dayton's argument on reinstatement does not consider the range of remedies available to someone who was unlawfully fired. In his complaint, Hanson asked that the Court "reinstate plaintiff in his position with the Office, together with full back pay and related benefits, **or alternatively, award plaintiff front pay in lieu of reinstatement**, together with full back pay and related benefits" (emphasis added). In order to

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[1] Senator Dayton attempts to focus on one provision of the Congressional Accountability Act -- § 413, 2 U.S.C. § 1413 -- in isolation. But Pollard also held that "we must not analyze one term of [a statute] in isolation. See Gade v. National Solid Wastes Management Assn., 505 U.S. 88, 99 (1992) (' "[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law" ')." 532 U.S. at 852.

avoid litigation over a non-issue, Brad Hanson stipulates that -- should he prevail on his challenge to his firings -- he will accept front pay in lieu of reinstatement.

s/
Douglas B. Huron 89326
Richard A. Salzman 422497
Tammany M. Kramer 483146
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, NW
Suite 412
Washington, DC 20036
(202) 293-8090

Attorneys for plaintiff

Notation Pursuant to Clerk's Guide for Counsel

The following notices of appeal to this Court have been omitted in printing this joint appendix because they appear at the following pages in the appendices to the Jurisdictional Statement.

Appellant's Notice of Appeal to the United States Supreme Court, filed October 31, 2006, in the United States Court of Appeals for the District of Columbia Circuit 90a

Notice of Appeal to the United States Supreme Court, filed October 31, 2006, in the United States District Court for the District of Columbia 93a

Order of the United States Supreme Court
Entered on January 19, 2007

06-618 OFFICE OF SENATOR MARK DAYTON V. HANSON, BRAD

Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. In addition to the Question presented by the statement as to jurisdiction, counsel are directed to brief and argue the following Questions: 1) Was the Office of Senator Mark Dayton entitled to appeal the judgment of the Court of Appeals for the District of Columbia Circuit directly to this Court? 2) Was this case rendered moot by the expiration of the term of office of Senator Dayton? The Chief Justice took no part in the consideration or decision of this case.

(15)

No. 06-618

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR APPELLANT

JEAN M. MANNING
Senate Chief Counsel for Employment
Counsel of Record
TOBY R. HYMAN
CLAUDIA A. KOSTEL
DAWN BENNETT-INGOLD
OFFICE OF SENATE CHIEF COUNSEL FOR EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
Phone: (202) 224-5424
Facsimile: (202) 228-2557

THOMAS C. GOLDSTEIN
WILLIAM F. ALLEN
CHRISTOPHER M. EGLESON
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
Phone: (202) 887-4000
Facsimile: (202) 887-4288

Counsel for Appellant

APPEAL DOCKETED NOVEMBER 3, 2006
JURISDICTION POSTPONED JANUARY 19, 2007

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I. THIS CASE IS PROPERLY BEFORE THIS COURT[1]

A. CAA § 412 Applies To The Appeal In This Case

A statute providing for appeal to this Court from a judgment "upon the constitutionality" of a provision of a statute, such as CAA § 412, 2 U.S.C. § 1412, encompasses appeal from a judgment upon the constitutionality of a provision of the statute, as applied. See *United States v. Eichman*, 496 U.S. 310, 313 (1990) (appeal pursuant to 18 U.S.C. § 700(d) from judgment upon the constitutionality of Flag Protection Act of 1989, as applied); cf. *Fleming v. Rhodes*, 331 U.S. 100, 104 (1947) (where statute provided for direct appeal to this Court from a decision "against the constitutionality" of a statute, "there is an appeal from an order that invalidates, as unconstitutional, a statute as applied"). The argument below of the Office of Senator Mark Dayton ("Dayton Office") that the Speech or Debate Clause deprives the court of jurisdiction of Hanson's suit squarely placed in issue the constitutionality of CAA § 408, 2 U.S.C. § 1408, as applied in this case. Thus, the judgment below is not only a ruling on the scope of the Speech or Debate Clause but also a judgment on the constitutionality of CAA § 408, *as applied*.[2]

The legislative history supports that Congress intended this Court to decide appeals from rulings challenging the CAA on Speech or Debate Clause grounds. When Congress added CAA § 413, 2 U.S.C. § 1413, to S. 2, the bill that would become the

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[1] The Office of Senator Mark Dayton responds to the arguments of Appellee Brad Hanson ("Hanson"); the United States Senate ("Senate Amicus"); Congressmen Frank and Shays; and AARP.

[2] Accepting this appeal will not open the appeal floodgates. See Senate Amicus at 12. A district court ruling on a Member's assertion of Speech or Debate Clause privilege in response to discovery would not implicate any provision of the CAA and, therefore, would not be a ruling "upon the constitutionality of any provision of this Act."

CAA, expressly preserving the Speech or Debate Clause privileges, Congress simultaneously added CAA § 412 to ensure that any doubts regarding the applicability of the privileges would be decided quickly and definitively by this Court.[3]

B. The Dayton Office Properly Appealed This Case To The D.C. Circuit

The Dayton Office and Hanson agree that the district court's minute order could not have been appealed directly to this Court. See Hanson Br. at 42; but see Senate Amicus at 12-14. In its Motion to Dismiss, the Dayton Office argued that Speech or Debate Clause immunity protects personnel actions taken against employees whose job duties directly relate to the due functioning of the legislative process and that Hanson's duties were such duties. (Def.'s Mot. Dismiss and Stmt. of P. & A. in Supp., No. 03-CV-1149, Dkt. Entry #12 (Sept. 12, 2003).) As such, in denying the motion to dismiss, the court could have concluded that Hanson's duties were not directly related to the due functioning of the legislative process -- a decision that would not have been upon the constitutionality of the statute. Because the district court's minute order provided no rationale (J.S. App. 58a-59a), the Dayton Office did not know and could not have known whether the decision was

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[3] Compare S. 2, 104th Cong. (1995), the bill that became the CAA, with H.R. 1, 104th Cong. (1995) (the version of the bill passed by the House before passing S. 2); see also the statement Senator Dole made at the time the appeal provision for the Government Employee Rights Act of 1991 ("GERA"), the predecessor to the CAA, 2 U.S.C. § 1224(c) (repealed 1995), was introduced: "[T]here are still some lingering doubts as to the constitutionality of these [judicial review] provisions," and "[t]hese doubts should be resolved by the best arbiter of constitutional issues, the Supreme Court itself, and as quickly as possible." 137 Cong. Rec. S15500 (daily ed. Oct. 30, 1991).

upon the constitutionality of the statute. There was no such uncertainty in *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389, 389-90 (1982), which therefore has no application to this appeal.

C. The Petition For A Writ Of Certiorari Is Proper

This action is also reviewable by this Court by writ of certiorari pursuant to 28 U.S.C. § 1254(1) because the D.C. Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court" and "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

II. THIS CASE IS MOOT

Abrogating the sovereign immunity of congressional employing offices, Congress in the CAA specified that the "employing office" -- and only the employing office -- shall be the defendant in a suit under the statute. 2 U.S.C. § 1408. The "employing office" is "the personal office of a Member of the House of Representatives or of a Senator." 2 U.S.C. § 1301(9)(A).

Congress's design was both conscious and careful. Prior versions of the bill, which were not enacted, instead denominated as the defendant "the Congress" or "the Senate." Appellant Br. at 20-21. One version notably would have permitted suit "against the Congress *or* the congressional employer." H.R. 2099, 103d Cong. § 2(c)(1) (1993) (emphasis added).

The "employing office" is a formal entity, not an artificial construct. The CAA may have established that term of art, but the term nonetheless describes an entity that previously existed:

employing offices were "employing authorities that *exist[ed]* in the Legislative Branch" prior to the enactment of the CAA. H.R. Rep. No. 103-650, pt. 2, at 13 (1994) (emphasis added). The employing office comes into existence when the Member is elected and dissolves when the Member leaves.[4]

The employing office (rather than, for example, the Senate) makes the employment decisions -- hiring, firing, promoting, and the like -- that are subject to suit under the statute. Thus,

> [i]ndividuals do not, in fact, work for "Congress" in a generic sense, rather they are employed by one of a number of distinct employing offices -- each of which is considered a separate entity -- whether that entity is the office of an individual Senator or Member of Congress . . . .

H.R. Rep. No. 103-650, pt. 2, at 13 (1994) (accompanying H.R. 4822). Each employing office has, for example, its own employee policy manual. The employing office notably has (as Hanson and Senate Amicus point out) its own counsel -- the Office of the Senate Chief Counsel for Employment ("SCCE") -- which operates independent from the counsel to the Senate itself, maintaining distinct client relationships and privileges that the Senate has always respected. "[E]ach of the 180 offices of the Senate is an individual client of the SCCE, and each office maintains an attorney-client relationship with the SCCE." *Legislative Branch Appropriations for Fiscal Year*

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[4] Notably, once the Member leaves office no entity exists to control the litigation on behalf of the defendant. There literally is no party with the power and responsibility to determine what defenses should be interposed, what discovery should be taken, what motions should be filed, and the like.

2000, Hearings Before a Subcomm. of the Comm. on Appropriations, 106th Cong., S. Hrg. 106-33 (1999), at 251. Contra Hanson Br. at 46; Senate Amicus at 17 (seeking to characterize an employing office as an administrative unit of the Senate). Accordingly, since the inception of the SCCE, Senate leadership has never requested or received confidential or privileged information from the SCCE about CAA cases; has not tried to participate in counseling or mediation; has never directed or participated in litigation strategy; and has never reviewed, read, approved, or been a signatory to a settlement agreement.

Once a Member leaves office, the corresponding employing office ceases to exist. For example, no office exists that could hire or fire employees, or incur any debts; the office space must be vacated, and the office receives no mail. Appellant Br. App. 6a-7a (employees taken off the payroll on January 2 of the year Member's term expires). The only office expenses that can be paid after the Senator leaves office are those incurred prior to the close of the office. These payments are made from the office's appropriated funds and only to the extent that any balance of such funds remains. Moreover, the office has no further responsibilities under the CAA, nor could it continue to comply with the Act. See, *e.g.*, S. Res. 242, 104th Cong., § 825.312(d) (1996) (stating that FMLA rights, including the right to restoration, cease once the employment relationship terminates). At that point, the office no longer meets the definition of an "employing office" because it is not the "personal office" of any member of Congress. Further, the CAA definition of "employing office" does not mention former Representatives or former Senators, see 2 U.S.C. § 1301(9)(A), and could not because former Members do not have personal offices in the legislative branch. In contrast, the statute expressly covers "former employee[s]." See 2 U.S.C. § 1301(4).

When a defendant ceases to exist and there is no successor, the case abates. *Def. Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634 (1949). In this case, Hanson's lawsuit names as the only defendant a literally non-existent entity that has no successor: the Dayton Office. When the Senator's term of office expired, the office simply ceased to exist, and the case abated.

Hanson notes that "[f]indings of abatement are now rare" because state laws and court rules (such as this Court's Rule 35.3) "cured the problem." Hanson Br. at 44. Appellant's Brief at 19 n.6 identified numerous federal statutes providing for succession and non-abatement of actions. But the relevant point is that Congress did not do so with respect to the CAA. That contrast is striking.

Moreover, in determining whether an action abates, the question is not whether some entity exists that would pay a judgment. Rather, the question is whether a defendant exists; the straightforward answer is "no." E.g., *Asociacion de Empleados del Area Canalera v. Panama Canal Comm'n*, 453 F.3d 1309, 1314 n.6 (11th Cir. 2006) (despite the continued availability of funds, suit could not continue because the defendants were defunct).[5] Further, contrary to Hanson's argument (Hanson Br. at 43), neither *Powell v. McCormack*, 395 U.S. 486, 498 (1969), nor *Davis v. Passman*, 442 U.S. 228, 229 (1979), is on point because at least two adverse parties existed in each case.

The Dayton Office is not extant simply because attorneys continue to defend "vigorously" the suit. For a suit to continue, there must be a party. See *Ellis v. Dyson*, 421 U.S. 426, 434

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[5] Notably, 2 U.S.C. § 1415(c) states that payments for "violations of section 201(a)(3)" must be paid by employing offices' appropriated funds.

(1975) (case or controversy requires extant parties throughout the litigation); *Shaffer v. Howard*, 249 U.S. 200, 201 (1919) (case mooted when defendant no longer in office and there was no statutory successor). Certainly in almost every abatement case, a lawyer continues to litigate the question of abatement. And when a defendant dies, a lawyer, after all, files a "suggestion of death." In this case, the SCCE has not continued to pursue this litigation based on the view that the employing office continues to exist; to the contrary, SCCE does not believe that it has a client in this litigation. But until this Court reaches that conclusion, counsel's obligation to the Court requires SCCE's continued participation.

Any doubt that only the employing office is the defendant in an action under the CAA and that this case has abated for that reason is resolved by the fact that the statute's private right of action is a waiver of the government's sovereign immunity from suit. That waiver must be "strictly observed." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981). Congress specified that the suit authorized against the employing office under the CAA "shall not constitute a waiver of sovereign immunity for any other purpose." 2 U.S.C. § 1413. Permitting this suit to go forward would require interposing some new defendant -- presumably, the Senate itself. But Congress has not waived the Senate's immunity from suit. See Appellant Br. at 20-21.

Further, the employing office is not merely a nominal entity, such that its dissolution is irrelevant. As noted, Congress took care to waive sovereign immunity specifically and exclusively with respect to the employing office. Hanson argues (Hanson Br. at 34) that the staff covered by the CAA are employees of the Senate or House, not the employing office. That is untrue and irrelevant: the legal issue is the status of the defendant, not the plaintiff. The further fact that "institutional counsel" represent the employing office (Hanson Br. at 34)

actually supports the finding of abatement, for it is notably the SCCE (not Senate Counsel) that is the employing office's counsel and indeed has a distinct attorney-client relationship with each office.[6] Finally, the fact that the Office of Compliance must authorize payment on settlements from the Treasury (Hanson Br. at 35) does not compel a contrary conclusion. The employing office (not the Senate) negotiates any settlement and must agree to it; the Office of Compliance (which is itself not an organ of the Senate) plays a purely administrative role and has promptly processed payment on every settlement to which Senate employing offices have agreed.

Substituting the Senate as the defendant would raise perplexing questions given Congress's political environment. For example, if a Senator from one party were sued while the other party controlled the Senate, the Senate and the Senator's office could have conflicting interests in litigation strategy and settlements. The Senate could settle the case for a significant sum and neither deny wrongdoing nor make the settlement agreement confidential. These political problems would be exacerbated if the Senator were running for reelection or for higher office.

Finally, Hanson argues that abatement is harsh. That is intrinsic to the doctrine; by definition, its application in a case in which a defendant ceases to exist extinguishes the plaintiff's right of action. But Hanson's contention that abatement would eviscerate the statutory scheme is wrong. Since the passage of

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[6] The extraordinary consequence of the position of Hanson and Senate Amicus that the actual employer and defendant in CAA actions is Congress or the Senate would presumably be that individual Senate employing offices would lose their attorney-client privilege with the SCCE, contrary to the express statements and practice in the Senate since the SCCE's inception.

the CAA, abatement has arisen only twice. The median tenures of Senators and Representatives are eleven and nine years, respectively. The CAA provided Hanson with a right to seek a remedy for alleged discrimination; indeed, he pursued counseling and mediation and, had he pursued his claim under 2 U.S.C. § 1405, his case would have been resolved before the employing office ceased to exist. But in any event, this is a question for Congress, which is fully empowered to provide for a successor to the employing office if it deems such a course appropriate. It is not for this Court to interpose that decision. See, *e.g.*, *United States ex rel. Bernardin v. Butterworth*, 169 U.S. 600, 605 (1898) (recommending Congress provide for non-abatement of actions against heads of departments).

III. THE SPEECH OR DEBATE CLAUSE BARS COURT JURISDICTION OF THIS ACTION

The Speech or Debate Clause does not bar CAA plaintiffs from seeking relief under the CAA. It affects only the forum in which some employees can sue. Those employees can file complaints with the Office of Compliance, 2 U.S.C. § 1405(a), receive a full hearing before an experienced arbitrator or retired judge, and receive all relief allowed by the statute, *id.* § 1405(c) and (g), because the Office of Compliance is part of the legislative branch, 2 U.S.C. § 1381(a). The forum restriction prevents judicial intrusion into the legislative function. A Member would have no legislative independence if a court were to hire and fire his alter egos directly; the Member's independence would be equally imperiled if a court accomplished the same thing, one step removed, by second guessing the Member's termination of his alter egos.[7]

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[7] The Judicial Conference report to Congress rejected application of CAA laws to the judicial branch because "[t]he judicial branch is a separate and co-equal branch of government under the United States Constitution.

A. Reliance On *Forrester* Is Misplaced

Hanson's and Amici's reliance on *Forrester v. White*, 484 U.S. 219 (1988), is misplaced. About the only thing *Forrester* and this case have in common is that both involved a termination. While the *Forrester* test balances considerations of public policy against the effect of exposure to liability, 484 U.S. at 224, "balancing plays no part" in determining the applicability of Speech or Debate Clause immunity. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 510 n.16 (1975). Thus, the "Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U.S. Const., Art. I, § 6, cl. 1." *Forrester*, 484 U.S. at 224.

Moreover, the rationales underlying common law judicial immunity and constitutional Speech or Debate Clause immunity are not the same. Judicial immunity "protect[s] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants." *Id.* at 225. Speech or Debate Clause immunity is based on "the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch," and "the desire to protect legislative independence." *United States v. Gillock*, 445 U.S. 360, 369 (1980). Accordingly, while Speech or Debate Clause immunity

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It must retain autonomy with respect to internal administration . . . ." See JUDICIAL CONFERENCE OF THE U.S., STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, at 4 (Dec. 1996). The report explained that the preservation of an independent judiciary relies, in part, on "judicial autonomy in hiring law clerks and other judicial staff." *Id.* Requiring, for example, the payment of overtime wages to court employees would result in the hiring of fewer people, in turn disrupting the functioning of the judicial branch. *Id.* at 17.

protects all acts within the legislative sphere,[8] judicial immunity of state judges protects judicial independence and impartiality in adjudicating cases and, as such, does not protect all acts within the judicial sphere.[9]

B. The Speech Or Debate Clause Bars Court Jurisdiction Of This Suit Notwithstanding That The Defendant Is The Office Of A Member

The Speech or Debate Clause protects all acts within the legislative sphere irrespective of who the named defendant is.[10] Otherwise, none of the protections of the Speech or Debate

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[8] The Court has defined acts within the legislative sphere in various ways: (1) the due functioning of the legislative process, see *United States v. Brewster*, 408 U.S. 501, 512 (1972), and (2) an "integral part of the deliberative and communicative processes," by which Members perform their constitutional duties. *Gravel v. United States*, 408 U.S. 606, 625 (1972). The only acts the Court has found not protected by Speech or Debate Clause immunity are "the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress," *Brewster*, 408 U.S. at 512; accepting a bribe for a promised legislative act, *id.* at 526-27; attempting to influence the Department of Justice, *United States v. Johnson*, 383 U.S. 169, 172 (1966); private republication of classified report, *Gravel*, 408 U.S. at 625; and public republication of defamatory statements, *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979).

[9] *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), is also inapt. There, the only issues were whether local officials had legislative immunity and whether introducing, voting for, and signing an ordinance were legislative acts. Notably, the Court did not apply a *Forrester* analysis. Moreover, *Bogan* did not involve an employee whose duties were part of the due functioning of the legislative process.

[10] As such, although the Speech or Debate Clause mentions only Senators and Representatives, "prior cases have plainly not taken a literalistic approach in applying the privilege." *Gravel*, 408 U.S. at 617.

Clause would be afforded: (i) preventing intimidation of legislators and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181 (1966); (ii) preventing the judiciary from intruding into the legislative sphere, and judging a Member's motive as to acts within the legislative sphere, *Eastland*, 421 U.S. at 502, 509; (iii) ensuring that legislators are not diverted from their constitutional duties, *id.* at 503; and (iv) "support[ing] the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal," *Coffin v. Coffin*, 4 Mass. (1 Tyng) 1, 27 (1808). "[J]udicial power [would] still [be] brought to bear on [a] Member[] of Congress and legislative independence [would be] imperiled." *Eastland*, 421 U.S. at 503. Thus, the immunity applied to a Senate subcommittee, which is an employing office under the CAA, see *id.* at 501, and to House functionaries who were not staff of a Member or Committee, see *Doe v. McMillan*, 412 U.S. 306, 312 (1973); see also *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (state committee and mayor acting in a legislative capacity covered); *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 733-34 (1980) (state supreme court acting in a legislative capacity protected).[11]

Further, Senate Amicus's assertion that Congress has waived the Speech or Debate Clause immunity of all Senate offices (Senate Amicus at 27 n.23) is inconsistent with Speech or Debate Clause jurisprudence in several respects. First, Speech or Debate Clause immunity must be expressly waived, see *United States v. Helstoski*, 442 U.S. 477, 490-91 (1979), and the CAA does not do so. Second, "the 'privilege is not a badge . . . , but an expression of a policy designed to aid in the

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[11] Although *Tenney* and *Consumers Union* involved state actors in § 1983 cases, the Court applies Speech or Debate Clause analysis in determining state legislators' immunity in § 1983 cases.

effective functioning of government.'" *Gravel v. United States*, 408 U.S. 606, 617 (1972) (quoting *Barr v. Mateo*, 360 U.S. 564, 572-73 (1959)). Thus, the issue is not who was sued. The issue is whether the case can be tried without a court questioning a legislative act or the motive for it. Third, the privilege "is not so much the privilege of the house . . . as of each individual member . . . . [H]e cannot be deprived [of it], by a resolve of the house, or by an act of the legislature." *Coffin*, 4 Mass. (1 Tyng) at 27. Indeed, it would be a disservice to the Constitution and the history of the Speech or Debate Clause for the Clause to apply only when either house wants it to; the Clause protects independence, not conformity. The Member "does not hold this privilege at the pleasure of the house; but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature." *Id.*

Finally, Hanson asserts that even if Senator Dayton's personnel decisions with respect to Hanson are within the legislative sphere, the Dayton Office's implementation of those decisions is not protected if the decisions are unlawful.[12] Hanson Br. at 36. The cases he cites, *Kilbourn v. Thompson*, 103 U.S. 168 (1880), *Powell v. McCormack*, 395 U.S. 486 (1969), and *Dombrowski v. Eastland*, 387 U.S. 82 (1967), do not support his argument because those decisions were not based on whether the defendant was a Member, but on whether the challenged actions were within the legislative sphere. In both *Kilbourn* and *Powell*, the resolutions were void as to substance because the directive of the resolutions exceeded the Members' constitutional authority. Therefore, the suits could proceed against the functionaries because their implementation

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[12] Speech or Debate Clause immunity applies to an act that is within the legitimate legislative sphere even if the act is illegal. See *Eastland*, 421 U.S. at 510.

of those resolutions was not within the legitimate legislative sphere. In *Dombrowski*, the case could proceed against the subcommittee's counsel only with respect to conduct that was not within Congress's legislative sphere -- his alleged involvement in a conspiracy with a state legislative committee to seize documents on "*its*" behalf. 387 U.S. at 84 (emphasis added). In contrast, when the counsel acted on behalf of the U.S. Senate subcommittee, Speech or Debate Clause immunity applied. See *id.* at 83-85; see also *Gravel*, 408 U.S. at 619-20.

Unlike *Kilbourn* and *Powell*, Senator Dayton's actions did not exceed his constitutional authority. Therefore, even if one were to view the personnel actions as the Dayton Office's implementation of Senator Dayton's directives, the Speech or Debate Clause would still immunize them.

C. The Scope Of The Speech Or Debate Clause Is A Judicial Determination

The Court should not defer to Congress's alleged conclusion that the Speech or Debate Clause does not bar CAA cases (see Hanson Br. at 21-31; Senate Amicus at 28-29) because (1) resolution of this issue requires constitutional interpretation, which is solely within the purview of the courts and (2) Congress never determined that CAA cases were not barred by the Speech or Debate Clause.

The scope of the Speech or Debate Clause is an issue of constitutional interpretation, which rests solely with the courts. See *Board of Trustees v. Garrett*, 531 U.S. 356, 365 (2001) ("it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees"); *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("'[i]t is emphatically the province and duty of the judicial department to say what the law is.'") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137,

177 (1803)) (alteration in original). "Our system of government 'requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch,'" *Nixon*, 418 U.S. at 704 (quoting *Powell*, 395 U.S. at 549), so this Court has not deferred to the Senate's interpretation of the Speech or Debate Clause, see, *e.g.*, *Hutchinson v. Proxmire*, 443 U.S. 111, 113 (1979) (concluding that Speech or Debate Clause did not protect actions of the Senator even though the amicus brief filed by the Senate in that case argued otherwise).[13]

Further, Congress never concluded that the Speech or Debate Clause does not bar CAA actions.[14] Legislative history demonstrates Members' on-going separation of powers concerns with applying employment laws to Congress. Senators Ford, Heflin, Rudman and Stevens cosponsored an amendment to the proposed Government Employee Rights Act of 1991 ("GERA"), the predecessor to the CAA, providing that employment claims against the Senate would be addressed by an internal Senate office, not by the courts. S. Amend. 2112,

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[13] *McConnell v. FEC*, 540 U.S. 93 (2003), and *Rostker v. Goldberg*, 453 U.S. 57 (1981), state the general rule that Congress is given deference in areas where it has special expertise. *McConnell*, 540 U.S. at 137-38 (effect of contribution limits on the political process); *Rostker*, 453 U.S. at 64 (military). The case herein presents a much different issue. As noted, supra p. 13, Congress cannot decide when Speech or Debate Clause immunity applies; rather, the Member can assert his immunity "even against the declared will of the house . . . [and over] an act of the legislature." *Coffin*, 4 Mass. (1 Tyng) at 27. Congress and an individual Member can have conflicting interests with respect to asserting the privilege, as this case demonstrates.

[14] Senate Amicus's statement of the intent of CAA statutory language is not evidence of the entire Congress's intent at the time the CAA was passed. Moreover, fifty-five of the Senators who voted on the CAA in 1995 are no longer members of Congress.

101st Cong. (1990); see 136 Cong. Rec. S9342 (daily ed. July 10, 1990). Senator Ford explained: "[T]he Senate must be aware of creating potential conflicts with article I, section 6, clause 1 of the Constitution . . . ." *Id.* He noted that suits in federal court "could lead to the very 'questioning in another place' of Member actions that the Constitution attempted to guard against." *Id.* Likewise, Senator Stevens stated that a personnel decision regarding "personal assistants and policy advisors is integral to our functioning as legislators, and is therefore protected by the speech or debate clause." 137 Cong. Rec. S15385 (daily ed. Oct. 29, 1991). In the 102d Congress, with respect to a proposal for adjudicating claims challenging congressional personnel actions in court or before an executive branch administrative agency, then-Majority Leader Mitchell, a former federal judge, stated: "[T]his is the most blatantly, flagrantly, obviously unconstitutional proposal that I have seen since I have been in the Senate." *Id.* at S15359. The proposed amendment was defeated by a 61-38 vote. See *id.* at S15361. Regarding an amendment providing that cases would be adjudicated by an internal hearing board selected by a legislative office, Senator Mitchell explained, "Because of the 'speech and debate' clause prohibition which limits the reach of the Judiciary into the operations of a Senator's own office or committee, the independent hearing board is the trier of fact rather than [the Judiciary]." *Id.* at S15372-73. Similarly, in 1993, while commenting on her years of work on similar but unsuccessful proposed legislation, Congresswoman Schroeder stated, "[O]ne thing that we have learned since 1976 in working way back with Father Dryinan [sic], who is a great constitutional scholar, . . . if you are going to have a review and have it be constitutional, you probably can't go to the Federal courts, most constitutional scholars tell us." *Application of Laws & Administration of the Hill: Hearings Before the J. Comm. on the Org. of Cong.*, 103d Cong., S. Hrg. 103-115 (1993) at 4.

To address these concerns in the proposed CAA, Senator Mitchell asked Senator Glenn, as chair of the Governmental Affairs Committee, to "find a bipartisan solution" that would address Members' concerns. 141 Cong. Rec. S447 (daily ed. Jan. 5, 1995). On January 5, 1995, the House passed H.R. 1 and referred it to the Senate. This version of the bill was not acceptable to the Senate, which substituted its new draft of the bill, S. 2, for H.R. 1. See 141 Cong. Rec. S918 (daily ed. Jan. 12, 1995). While H.R. 1 did not contain § 413 or any similar language, S. 2 did contain § 413. S. 2, 104th Cong. (1995). In fact the only difference between H.R. 1 and S. 2 that addressed the Members' concerns about the principle of separation of powers is the addition of § 413. S. 2 passed and became law, the CAA, on January 23, 1995. 141 Cong. Rec. D72 (daily digest Jan. 23, 1995).

This legislative history confirms the clear statutory language -- Congress never determined that the Speech or Debate Clause did not bar court jurisdiction of any CAA case.[15] Rather, Congress passed the statute with the understanding that the Court would not allow a CAA case to proceed in violation of the Speech or Debate Clause.

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[15] The CRS memorandum Representative Goodling placed in the record, and which Hanson cites (Hanson Br. at 30), states:

> Staffs of Members are so essential to the functioning of the legislative process that under *Gravel* they are entitled to the same speech or debate immunity that the Members have. . . . [T]he [Speech or Debate] clause could very well protect the Members' discretion in choosing to hire or to keep or not keep any person they want on their staffs.

141 Cong. Rec. H265 (daily ed. Jan. 17, 1995).

D. Hanson's Suit Is Jurisdictionally Barred

Section 413 of the CAA preserves the "privileges" under the Speech or Debate Clause -- both the immunity from suit and testimonial privilege. 2 U.S.C. § 1413. Accordingly, the Speech or Debate Clause bars court jurisdiction of CAA cases that are predicated on a legislative act, or would require questioning of a legislative act or the motivation for the act, or would require a Member to answer -- in terms of defending himself -- for a legislative act and/or his motive for the act. See Appellant Br. at 25-27.

Application of this principle to Hanson's Fair Labor Standards Act claim bars court jurisdiction of that claim because adjudication of that claim would require questioning in detail Hanson's day-to-day duties and his performance of those duties, including whether his work was of substantial importance to the management or operations of the Dayton Office and the extent to which he exercised discretion and independent judgment in the performance of his job duties. See Appellant Br. at 40-41. Because Hanson's job duties were part of the legislative process, see below and Appellant Br. at 5, 38-40, such questioning would constitute questioning legislative acts.

Further, application of this principle to CAA discrimination claims would bar court jurisdiction of a case brought by an employee whose duties are part of the due functioning of the legislative process, unless the challenged action is beyond the apparent needs of the due functioning of the legislative process. That is so because managing an employee whose duties are part of the due functioning of the legislative process is itself part of the due functioning of the legislative process. See Appellant Br. at 28-32. Application of this rule bars court jurisdiction of Hanson's termination claims.

First, Hanson's job duties were part of the due functioning of the legislative process. See Appellant Br. at 38-40. He worked on "issues that were at the heart of Senator Dayton's constitutional obligation to represent his constituents . . . ." Hanson Br. App. 1a-2a ¶ 1. Hanson acted as Senator Dayton's representative to learn, among other things, "their (i) opinions about whether Senator Dayton should support or oppose certain legislation and (ii) suggestions regarding legislation Senator Dayton should introduce." J.S. App. 68a ¶ 6. "The information Mr. Hanson gathered from constituents, which was passed on to Senator Dayton, helped shape the Senator's legislative agenda and assisted him in representing Minnesotans." J.S. App. 68a ¶ 6. "Based on concerns constituents voiced to Mr. Hanson, he presented ideas to Senator Dayton that directly caused Senator Dayton (i) to initiate and to sponsor legislation . . . and (ii) to initiate a [Senate] hearing . . . ." J.S. App. 68a ¶ 6. Hanson was one of a few staff members who planned the committee hearing, "decided on its issues, selected hearing witnesses, and prepared questions that Senator Dayton asked at the hearing." J.S. App. 73a ¶ 14. Throughout his employment by the Dayton Office, Hanson's job included identifying opportunities for legislative initiatives. See J.S. App. 76a, 80a. Thus, Hanson was Senator Dayton's second self -- assisting the Senator to perform his constitutional duties. Second, Hanson's termination was not beyond the apparent needs of the due functioning of the legislative process. It was part of the due functioning of Senator Dayton's legislative process because the process functioned only if Senator Dayton selected alter egos. As such, the termination was a legislative act protected by the Speech or Debate Clause. Because Hanson's challenge to his termination is predicated on his termination and would necessarily require questioning his termination and/or the motivation for his termination, the Speech or Debate Clause bars court jurisdiction of his discrimination claims.

Moreover, the Speech or Debate Clause would bar court jurisdiction of Hanson's discrimination claims if the Court holds that the Clause bars jurisdiction of discrimination claims only where the challenged personnel action relates to the employee's performance of legislative duties. See Appellant Br. at 32-33. Hanson was terminated for his poor performance as head of the Health Care Help Line. For example, Hanson had ignored 150 constituent matters that provided information to Senator Dayton of constituents' concerns and "guide[d] [him] in determining what legislation he should sponsor, support or oppose." Hanson Br. App. 2a. Senator Dayton's performance of his constitutional duties was impeded by Hanson's failure to perform his job. See Hanson Br. App. 2a. Hanson's challenge to his termination could not be adjudicated without questioning his performance of his job duties within the legislative sphere and/or without requiring Senator Dayton to answer -- in terms of defending himself -- for a legislative act, i.e., Hanson's performance of his duties within the legislative sphere. Accordingly, the Speech or Debate Clause bars court jurisdiction of Hanson's discrimination claims.

* * * * *

For the foregoing reasons and those stated in the Dayton Office's opening brief, the Court should accept jurisdiction of this appeal pursuant to CAA § 412, dismiss the case as moot, or, alternatively, reverse the judgment of the court of appeals and remand with instructions to dismiss as jurisdictionally barred.

Respectfully submitted,

JEAN M. MANNING
Senate Chief Counsel
for Employment
Counsel of Record
TOBY R. HYMAN
CLAUDIA A. KOSTEL
DAWN BENNETT-INGOLD
OFFICE OF SENATE
CHIEF COUNSEL FOR
EMPLOYMENT
P.O. Box 77053
Washington, D.C. 20013
Phone: (202) 224-5424
Facsimile: (202) 228-2557

THOMAS C. GOLDSTEIN
WILLIAM F. ALLEN
CHRISTOPHER M. EGLESON
AKIN GUMP STRAUSS HAUER
& FELD LLP
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
Phone: (202) 887-4000
Facsimile: (202) 887-4288

Counsel for Appellant

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In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON, APPELLANT,

v.

BRAD HANSON, APPELLEE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING APPELLEE

MORGAN J. FRANKEL,
(Counsel of Record),
Senate Legal Counsel,
PATRICIA MACK BRYAN,
Deputy Senate Legal Counsel,
GRANT R. VINIK,
THOMAS E. CABALLERO,
Assistant Senate Legal Counsel,
Office of Senate Legal Counsel,
642 Hart Senate Office Building,
Washington, D.C. 20510
(202) 224-4435
Counsel for United States Senate

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In the Supreme Court of the United States

No. 06-618

OFFICE OF SENATOR MARK DAYTON, APPELLANT,

v.

BRAD HANSON, APPELLEE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING APPELLEE

INTEREST OF AMICUS

This case presents the question whether the Speech or Debate Clause bars civil actions brought under the Congressional Accountability Act against the office of a United States Senator by employees with legislative duties. The United States Senate has a particular interest in the resolution of that question because the protections of the Speech or Debate Clause are vital to maintaining the Senate's independence within the three branches of government under the Constitution. Congress passed the Congressional Accountability Act to provide workplace protections for Legislative Branch employees — including Senate employees. The Senate has a strong interest in how the Act is interpreted in actions regarding its own employees and in harmony with the Speech or Debate Clause.

The Senate appears as amicus curiae to present its views that (1) the Speech or Debate Clause does not bar jurisdiction over suits under the Congressional Accountability Act brought by employees with legislative duties,

(2) suits under the Act against the office of a Member of Congress do not become moot when the Member leaves office, and (3) the Office of Senator Mark Dayton was not entitled to appeal the judgment of the Court of Appeals directly to this Court.[1]

STATUTORY BACKGROUND

To evaluate the questions presented in this case, it is helpful to review the history of congressional efforts to apply federal employment laws to congressional employees that led to the Act's enactment.

A. Congressional Efforts to Apply Employment Laws to House and Senate Employees

The Congressional Accountability Act of 1995 ("CAA" or "the Act"), Pub. L. No. 104-1, 109 Stat. 3, was the culmination of a twenty-year effort to apply to Congress the various discrimination and workplace laws that regulate employment decisions in the private sector and the Executive Branch. That effort began in the mid-1970s, when the House and Senate separately adopted rules prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin.[2] However, those

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[1] This appearance is pursuant to 2 U.S.C. § 288e(a), which authorizes the Senate to appear "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." *See* S. Res. 121, 110th Cong. (2007), 153 Cong. Rec. S3724 (daily ed. Mar. 23, 2007) (directing Senate appearance in this appeal). Permission to appear as amicus is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). This brief is submitted in accord with Supreme Court Rule 37.4, which provides that "[n]o motion for leave to file an *amicus curiae* brief is necessary if the brief is presented . . . on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative."

[2] *See* H.R. Res. 5, 94th Cong. (1975); S. Res. 534, 94th Cong. (1976), *reprinted in Senate Manual*, S. Doc. No. 107-1, at 135-36 (2002). S. Res. 534 also prohibited discrimination on the basis of "state of handicap." The next year the Senate adopted S. Res. 110, 95th Cong., which added a standing rule incorporating S. Res. 534's prohibitions on discrimination in Senate employment and adding a prohibition on age discrimination. Senate Rule XLII, *reprinted in* S. Doc. No. 107-1, at 77.

rules provided no redress to employees for personnel actions that violated the rules.[3]

Over the next fifteen years, efforts continued to grant congressional employees the protections of federal employment laws, and especially to provide effective remedies for employees who were victims of discrimination.[4] In 1988, the House of Representatives agreed to a resolution setting out internal procedures for enforcing the House's prohibition on employment discrimination. *See* H.R. Res. 558, 100th Cong. (1988). Three years later, the House incorporated that resolution into its rules. *See* H.R. Res. 5, 102d Cong. (1991) (incorporated as Rule LI).

In 1991, Congress passed the Government Employee Rights Act ("GERA"), as part of the Civil Rights Act of 1991. Pub. L. No. 102-166, title III, 105 Stat. 1088, *formerly codified at* 2 U.S.C. §§ 1301 *et seq.* (1994) (*repealed in part by* CAA, Pub. L. No. 104-1, § 504(a)(2)). GERA provided that "[a]ll personnel actions affecting employees of the Senate shall be made free from any discrimination based on . . . race, color, religion, sex, or national origin, . . . age, . . . or handicap or disability" as defined in the relevant federal civil rights laws. *Id.* § 302, 105 Stat. 1088. GERA created an internal administrative process for handling employee discrimination complaints, which included counseling, mediation, and, if necessary, a hearing before an independent hearing board on the employee's allegations of discrimination. *Id.* §§ 305-307, 105 Stat. 1090-92. GERA provided that decisions of the hearing board were subject to review by the Senate Select Committee on Ethics, *id.* § 308, 105 Stat. 1092, and that a party could seek judicial review of the final decision of

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[3] In 1978, the Senate Committee on Governmental Affairs reported a resolution that would have created an administrative mechanism within the Senate for implementing and enforcing the Senate rule prohibiting employment discrimination, *see* 124 Cong. Rec. 35545-46 (1978) (Sen. Glenn), but that resolution did not pass.

[4] *See, e.g.*, S. 1112, 96th Cong. (1979) (bill to apply employment laws to legislative branch); *Congressional Civil Rights Bills: Hearing Before the Senate Comm. on Governmental Affairs*, 101st Cong., 1st Sess. (1990).

the Ethics Committee in the U.S. Court of Appeals for the Federal Circuit. *Id.* § 309, 105 Stat. 1093-94.

GERA's judicial review provision sparked lengthy debate in the Senate over whether such review comported with the separation of powers. *See* 137 Cong. Rec. 28902-22 (1991). During that debate, Senator Rudman raised a constitutional point of order that judicial review of claims by Senators' personal and committee staffs would constitute "an unconstitutional intrusion into the affairs of . . . the legislative branch[]." *Id.* at 28922. The Senate rejected that point of order by a 76-22 vote. *Id.*

Though these actions provided enhanced workplace protections, the Senate and House continued to study how to apply federal employment and workplace laws to employees of Congress with a full and effective remedy consistent with the Constitution.[5] In the 103d Congress, legislation was introduced to apply federal employment laws to Congress and to provide remedies congruent to those provided to private sector and Executive employees — particularly the right to file a civil action in federal court. One such bill, H.R. 4822, was passed by the House on August 10, 1994, *see* 140 Cong. Rec. 20773 (1994), but did not receive Senate action prior to adjournment.

B. Enactment of the CAA

At the opening of the 104th Congress, the long effort to apply employment laws to Congress culminated in the Congressional Accountability Act. Both Houses passed the CAA as their first piece of legislation, with only one vote against the Act in the entire Congress. *See* 141 Cong. Rec. 1076 (1995) (passed in Senate 98-1); *id.* at 1350-51 (passed in House 390-0).[6] In enacting the CAA, Congres-

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[5] *See Congressional Coverage Legislation: Applying Laws to Congress: Hearing Before the Senate Comm. on Governmental Affairs*, 103d Cong., S. Hrg. 103-1047 (1994); *Application of Laws and Administration of the Hill: Hearings Before the Joint Comm. on the Organization of Congress*, 103d Cong., S. Hrg. 103-115 (1993).

[6] On January 4, 1995, the House of Representatives passed H.R. 1, a bill to make certain workplace and employment laws applicable to the Legislative Branch. 141 Cong. Rec. 544-45 (1995). On January 11,

sional sponsors and proponents explained that the legislation sought to achieve four goals.

First, the proponents wanted to end the "inequitable" situation where "we as employers do not have the same laws apply to us as private sector employers do."[7] Second, the CAA's supporters wanted to "requir[e] Congress [to] live under the laws it passes for others" in order to "know firsthand the burdens that the private sector lives with," 141 Cong. Rec. 650 (Sen. Grassley), because "Congress will write better laws when it has to live by the same laws it imposes on the private sector and the executive branch."[8] Members pointed out that exempting Congress from laws of general applicability removed one of the important bonds between legislators and the people expounded by James Madison in *The Federalist No. 57* (B. Wright ed. 1967):

> I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as

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the Senate passed its own bill (S. 2) extending workplace and employment laws to legislative employees. *Id.* at 1076. After receiving the Senate's version, the House chose to adopt it, *id.* at 1350-51, avoiding the need to reconcile the two competing bills in conference. After the House passed S. 2, it was signed by the President and became Public Law 104-1, the Congressional Accountability Act of 1995.

[7] 141 Cong. Rec. 654 (Sen. Grassley); *see also id.* at 956 (Sen. Lieberman) (Congressional exemption from federal employment laws represents "a double standard . . . that is no longer acceptable"); *id.* at 1334 (Rep. Shays).

[8] 141 Cong. Rec. 535 (Rep. Shays); *see also id.* at 655 (Sen. Glenn) ("we in Congress cannot understand the real impact of our laws because we do not have to follow them back here on Capitol Hill"); *id.* at 956 (Sen. Lieberman) (exempting Congress from employment statutes "shields us from the real world experience of understanding the impact of our deliberations and our actions on those millions of people out there, particularly small business people, who must live by the laws that we pass"); *id.* at 535 (Rep. Goodling) ("We will never be as careful as we should be in passing, changing, and drafting laws until we ourselves are forced to comply with those laws . . .").

> on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny.

See id. at 650 (Sen. Grassley); *id.* at 665 (Sen. Snowe).

Third, the supporters of the legislation wanted to provide congressional employees with the full protections of employment laws that workers in the private sector and Executive Branch enjoyed.[9] Finally, the proponents wanted to ensure that the employment laws were applied to Congress in a manner that "respect[s] the separation of powers embodied in the Constitution." *Id.* at 535 (Rep. Shays). Accordingly, "[t]he bill was crafted to take into account constitutional issues," *id.* at 884 (Sen. Grassley), by "maintaining the independence of the legislative branch of Government." *Id.* at 668 (Sen. Reid); *see also id.* at 655 (Sen. Glenn) (legislation includes "protection of the constitutional independence of the House and Senate").

To accomplish these goals, the CAA makes applicable to the Legislative Branch the workplace and employment statutes governing private employers and the Executive Branch. CAA § 102 (2 U.S.C. § 1302). To enforce the protections provided by these laws, the CAA establishes an independent agency within the Legislative Branch, the Office of Compliance, to oversee compliance with the law. *Id.* §§ 301-305 (2 U.S.C. §§ 1381-1385). In addition, the CAA provides employees with counseling and mediation of employment disputes by the Office of Compliance. *Id.* §§ 402, 403 (2 U.S.C. §§ 1402, 1403).

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[9] *See, e.g., id.* at 655 (Sen. Glenn) ("to continue to deprive our employees of the full protection of the law is flat wrong"); *id.* at 660 (Sen. Lieberman) ("Congressional exemption from Federal employment laws . . . has also had an adverse effect on the legislative branch work force and its right to equal protection under the law.").

If mediation does not resolve the dispute, the CAA grants congressional employees the right to file an administrative complaint before the Office of Compliance, *id.* §§ 404, 405 (2 U.S.C. §§ 1404, 1405), or, unlike under GERA, to file suit in federal district court. *Id.* §§ 404, 408 (2 U.S.C. §§ 1404, 1408). The CAA requires that the defendant in such suits be the "employing office" and not any Member of Congress. *Id.* § 408(b) (2 U.S.C. § 1408(b)). Members are not responsible personally for any monetary judgments or settlements in CAA cases; rather, the Act creates a separate fund in the Treasury to pay judgments and settlements in wrongful personnel action cases. *Id.* § 415 (2 U.S.C. § 1415). Finally, the authorization for employees to pursue these remedies "shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any Senator or Member of the House of Representatives under [the Speech or Debate Clause] of the Constitution, or a waiver of any power of either the Senate or the House of Representatives under the Constitution, . . ." *Id.* § 413 (2 U.S.C. § 1413).

SUMMARY OF ARGUMENT

I. This appeal is not well-taken. Section 412 of the CAA (2 U.S.C. § 1412) permits appeals "directly to the Supreme Court" from decisions "upon the constitutionality of any provision" of the CAA. The decision below, however, was not a ruling upon the constitutionality of any provision of the CAA, but rather was a ruling on the scope of the Speech or Debate Clause and its application to the CAA. Therefore, the requirement for a direct appeal to this Court under section 412 is not met.

Indeed, if the contrary position of the Office of Senator Dayton ("Employing Office") were correct that a ruling denying the Office's assertion of Speech or Debate Clause immunity was a decision on the constitutionality of a provision of the CAA for purposes of section 412, then the district court's denial of the Employing Office's motion to dismiss was subject to appeal directly to this Court, and,

under *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389 (1982) (per curiam), this Court would be required to vacate the judgment of the D.C. Circuit for lack of jurisdiction under 28 U.S.C. § 1291 and dismiss this appeal.

The Employing Office's alternative request that the Court take this case under its certiorari jurisdiction should be denied because the decision below accords with this Court's precedent, and the two Circuits to have ruled on this question have both agreed that the Speech or Debate Clause does not bar jurisdiction over CAA suits by congressional employees.

II. The expiration of Senator Dayton's term has not mooted this case. No part of the CAA or its legislative history indicates that a Member's departure from Congress terminates suits against the Member's office. Moreover, the reason behind the abatement of actions for lack of a defendant — that no party exists to defend the action or to satisfy a judgment — does not apply here. The Employing Office, which is a unit of the Senate, maintains the ability to defend vigorously this action, and to satisfy any judgment or settlement from a Treasury fund created to pay such awards. Accordingly, this case remains a live controversy.

III. The Speech or Debate Clause provides Members of Congress with an absolute immunity for their legislative activities to "insure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). To effectuate that purpose, the Court has held that the Clause protects not just speech and debate on the floor of the House and Senate, but all actions that are "an integral part of the deliberative and communicative processes by which Members participate" in legislative proceedings. *Gravel v. United States*, 408 U.S. 606, 625 (1972). While this Court has consistently "read the Speech or Debate Clause broadly to effectuate its purposes," *Eastland*, 421 U.S. at 501, it "has been careful not to extend the scope of the protection further

than its purposes require." *Forrester v. White*, 484 U.S. 219, 224 (1988). Thus, Members' activities that are only related to the legislative process, and not a part of the due functioning of that process, have been found to be outside of the Clause's protections. *See United States v. Brewster*, 408 U.S. 501, 512 (1972).

As the D.C. Circuit found, adverse personnel actions against congressional employees, including employees with legislative duties, are not themselves part of the legislative process. J.S.App. 15a-18a, 459 F.3d at 10-13; *id.* at 28a, 459 F.3d at 17 (Rogers, J., concurring in part and in the judgment). This Court's analysis in *Forrester*, 484 U.S. 219, holding that a state judge's discharge of a probation officer was not part of the judge's adjudicative function and thus was not covered by judicial immunity, applies equally to the congressional context and supports the conclusion that Members of Congress do not act in a legislative capacity when they take personnel actions. Hence, the Speech or Debate Clause does not bar jurisdiction over CAA suits brought by employees with legislative duties challenging adverse personnel actions.

While the Clause does not operate to preclude outright all CAA suits by employees with legislative duties, Congress recognized that the Clause's privilege could be implicated where particular proceedings in CAA suits encroached upon a Member's participation in the legislative process. Consequently, Congress structured the CAA's remedial scheme to insulate Members' independent performance of legislative functions. First, Congress expressly preserved the Speech or Debate Clause privilege of individual Members in CAA actions. CAA § 413 (2 U.S.C. § 1413). That privilege protects Members from being compelled to produce documents or testify about legislative acts or motivations, and bars relief that would infringe on a Member's independence in carrying out legislative activities. In contrast to the blanket jurisdictional bar asserted by the Employing Office, proper application of the Clause's privilege in CAA proceedings is fact-spe-

cific and, as recognized by the D.C. Circuit, must be determined on a case-by-case basis by the lower courts.

Further, Congress provided that civil actions could be brought against an employing office only and not against any Member, CAA § 408(b) (2 U.S.C. § 1408(b)); therefore, the employing office — not a Member of Congress — is the party against whom any judgment is entered. Moreover, judgments against employing offices in discrimination actions are paid from a special fund created for that purpose, *id.* § 415 (2 U.S.C. § 1415), and not by the Member personally nor from funds allotted to the Member's office. Thus, Congress created a specific mechanism for remedial actions to shield Members' legislative independence from intrusion.

By enacting the CAA with its particular remedial scheme, Congress determined, after specifically considering the impact of the Speech or Debate Clause, that suits against employing offices do not infringe on a Member's individual Speech or Debate immunity. This determination merits special deference by the Court for two reasons. First, Congress has both the most experience with application of the Speech or Debate Clause as well as the greatest interest in protecting the scope of immunity under the Clause. Second, the CAA involves management of the employment affairs solely of the Legislative Branch, over which Congress has unique authority. Accordingly, Congress's determination that it could provide federal employment protections to its own employees consistent with the Speech or Debate immunity of its Members deserves respect from the Judicial Branch.

ARGUMENT

I. THE EMPLOYING OFFICE IS NOT ENTITLED TO APPEAL TO THIS COURT

A. The Requirements of 2 U.S.C. § 1412 Are Not Met

Section 412 of the CAA (2 U.S.C. § 1412) provides that "[a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order of a court upon the constitu-

tionality of any provision of this Act" and "[t]he Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal . . . advance the appeal on the docket, and expedite the appeal to the greatest extent possible." This case does not meet the requirements for direct appeal because the D.C. Circuit's ruling that the Speech or Debate Clause does not bar federal court jurisdiction over this suit was not a "judgment, decree, or order . . . upon the constitutionality" of any provision of the CAA. Rather, that decision was a ruling on the scope of the Speech or Debate Clause. In no part of its opinion does the Court of Appeals rule upon the constitutionality of any provision of the CAA. Accordingly, in light of this Court's admonition that in evaluating its appellate jurisdiction "statutes authorizing appeals are to be strictly construed," *Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 43 (1983) (citing *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970)), the Employing Office was not entitled to appeal the judgment below to this Court under section 412.

The Employing Office argues that by holding that "the Speech or Debate Clause does not constitutionally bar court adjudication of Hanson's claims," the D.C. Circuit implicitly ruled upon the constitutionality of CAA sections 408 and 413 as applied to suits by employees with legislative duties. Brief for Appellant at 14-15. Yet, nothing in the D.C. Circuit's ruling addressed the constitutionality of those (or any other) sections of the CAA. Indeed, by expressly preserving Members' Speech or Debate privileges in section 413, Congress made clear that the CAA's authorization of civil suits by employees was to be understood congruent with the Speech or Debate Clause. Consequently, a ruling on the scope of the Clause in CAA actions does not implicitly address the constitutionality of

the CAA, but rather resolves how the privilege preserved by section 413 applies in a given suit.[10]

The Employing Office's interpretation of section 412 would permit direct, expedited review in this Court over every ruling by a lower court applying the Speech or Debate Clause in a particular CAA case. For instance, every district court ruling on a Member's assertion of Speech or Debate privilege in response to discovery requests in a CAA case would qualify for direct review by this Court under the Employing Office's reading of section 412. Similarly, each time a court determined whether a particular remedy under the CAA intruded on a Member's Speech or Debate Clause immunity, its decision would be subject to direct appeal to this Court. And the limitation in section 412(b) that the Court should accept jurisdiction "if it has not previously ruled on the question" would be no limitation at all, as each dispute over the Speech or Debate privilege would involve its own particular circumstances and facts regarding legislative activities that would present a distinct question as to whether the Clause applied in that situation. An interpretation of section 412 that yields such an unbounded expansion of matters directly appealable to this Court cannot be squared with the Court's admonition to construe strictly statutes authorizing appeals.

Finally, if the Employing Office is correct that section 412 authorizes a direct appeal to this Court from a decision allowing adjudication of this suit despite the assertion of Speech or Debate Clause immunity, then the district court's denial of the motion to dismiss qualifies as a decision on the constitutionality of a part of the CAA for purposes of section 412, and this Court's decision in *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389 (1982) (per curiam), would require that this

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[10] That understanding comports with the issue presented by the Employing Office to the Court of Appeals: "In light of section 413, is court adjudication of this suit barred?" Brief of Appellant Office of Senator Mark Dayton at 3, filed July 11, 2005, USCA Case No. 04-5335.

appeal be dismissed and the Court of Appeals' decision vacated for lack of jurisdiction under 28 U.S.C. § 1291.

In *Donovan*, an association sued officials of the U.S. Department of Labor challenging application of the Fair Labor Standards Act. The district court held that the act was unconstitutional as applied. *Id.* at 389. At that time, title 28 contained a section that provided:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree, or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies or any officer or employee thereof, as such officer or employee, is a party.

28 U.S.C. § 1252 (1982), *repealed by* Pub. L. No. 100-352, § 1, 102 Stat. 662 (1988). Although the government in *Donovan* could have appealed the district court's ruling directly to the Supreme Court under that provision, it chose to appeal instead to the court of appeals, which affirmed the district court's decision. 454 U.S. at 389. The government then sought to invoke 28 U.S.C. § 1252 to appeal the decision of the court of appeals to the Supreme Court.

This Court ruled that because the government officials could have appealed the district court's judgment directly to the Supreme Court, the court of appeals lacked jurisdiction as 28 U.S.C. § 1291 provides jurisdiction to the courts of appeals "from all final decisions of district courts of the United States . . . *except where a direct review may be had in the Supreme Court*." 28 U.S.C. § 1291 (emphasis added); *Donovan*, 454 U.S. at 389-90. Accordingly, the Court held that because the court of appeals lacked jurisdiction under 28 U.S.C. § 1291, "its judgment and opinion must be vacated." 454 U.S. at 390. And, the Court concluded, the appeal from that decision "must be dismissed," as the "proper course of conduct was to file a direct appeal from the decision of the District Court." *Id.* The Court further noted that no appeal could be taken

from the district court's decision, as the time for an appeal under 28 U.S.C. § 2101(a) had expired, and declined to remand the case to the district court to enter a new judgment to re-open the time for appeal. *Id.* at 390-91.

Therefore, *if* the Employing Office's position were correct, then the Court of Appeals lacked jurisdiction over the appeal under 28 U.S.C. § 1291 because the district court's decision could have been appealed directly to the Supreme Court. Under *Donovan*, this Court would be required to dismiss this appeal and vacate the judgment of the D.C. Circuit for lack of jurisdiction.[11]

B. This Case Does Not Merit Certiorari Review

Alternatively, the Employing Office requests that the Court treat its jurisdictional statement as a petition for a writ of certiorari. As none of the considerations set forth in Supreme Court Rule 10 for granting such a writ are satisfied here, the Court should decline to hear this case under its certiorari jurisdiction. First, the Court of Appeals' decision does not conflict with decisions of this Court. As the opinion below reflects, and as explained further *infra*, section III, the Court of Appeals' conclusion that the Speech or Debate Clause does not bar jurisdiction over CAA suits by employees with legislative duties is based on and accords with this Court's established Speech or Debate Clause precedent and its decision in *Forrester v. White*, 484 U.S. 219, that judicial immunity does not protect a judge from suit for adverse personnel

[11] Insofar as the Employing Office asserted jurisdiction in the Court of Appeals under 28 U.S.C. § 1291, Brief of Appellant Office of Senator Mark Dayton at 2, filed July 11, 2005, USCA Case No. 04-5335, and the Court of Appeals noted that it had jurisdiction under that section, *see* J.S.App. 4a at n.1, 459 F.3d at 4 n.1, it would appear that neither the parties nor the Court of Appeals considered the denial of defendant's motion to dismiss to be a decision on the constitutionality of the CAA as to which "direct review may be had in the Supreme Court."

Nor is pursuing an intermediate appeal followed by appeal to this Court consistent with the purpose of the expedited direct appeal provision, which is to permit expeditious resolution by this Court of an unsettled question about the constitutionality of a federal statute.

actions against an employee who supported the judge's adjudicative function.

Further, the D.C. Circuit's decision does not conflict with the decision of any other court of appeals. To the contrary, the only other court of appeals to have reached the question presented here, the Tenth Circuit, held, as the D.C. Circuit did, that CAA actions by congressional employees are not barred by the Speech or Debate Clause. *See Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1318-19 (10th Cir. 2004), *cert. denied*, 126 S. Ct. 396 (2005).

Finally, the D.C. Circuit's decision does not constitute an important question of federal law that "should be [] settled by this Court." Supreme Court Rule 10(c). All the judges on the D.C. Circuit en banc (as well as on the Tenth Circuit panel in *Bastien*) agreed on the main question presented here — that the Speech or Debate Clause does not bar jurisdiction over CAA suits. Thus, no uncertainty in that question necessitates Supreme Court review. The remaining issues on which the D.C. Circuit judges disagreed are matters that require a case-by-case determination that is appropriately conducted by the district court on a fully developed record.

Accordingly, this case does not present any question that merits the Court's resolution at this time, and the Court should reject the Employing Office's alternative request to review the D.C. Circuit's decision on certiorari.

II. SENATOR DAYTON'S DEPARTURE FROM CONGRESS DID NOT MOOT THIS CASE

On January 3, 2007, Senator Dayton's term expired. That same day the Employing Office filed with this Court a suggestion of mootness, asserting that it (the Employing Office) had ceased to exist and, therefore, this action has abated for lack of a defendant, rendering the case moot. A review of the CAA's remedial scheme in light of Congress's purpose to provide its employees workplace protections with meaningful remedies refutes any suggestion that CAA suits against employing offices abate when

a Member departs from Congress. Further, the defendant in this case remains capable of vigorously defending this action and of satisfying any monetary judgment entered against it. Accordingly, a live controversy remains and this case is not moot.

At common law, "the death of the natural person abates all pending litigation to which such a person is a party," and, similarly, the "dissolution of a corporation at common law abates all litigation in which the corporation is appearing." *Oklahoma Gas Co. v. Oklahoma*, 273 U.S. 242, 247 (1927). That Senator Dayton's term has expired, however, does not resolve whether the office has ceased to exist for purposes of this litigation. *Cf. Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634-35 (1949) ("a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions"). Determining whether this case has abated depends on both the intent of Congress and the existence of a defendant with the ability to defend the case vigorously and satisfy any judgment against it.

No provision of the CAA, nor any part of the Act's legislative history, indicates or even suggests that a cause of action against a Member's office would terminate when the Member leaves Congress. To the contrary, the structure of the CAA evinces an institutional basis for suits against Senate offices to survive the term of office of a particular Member. For example, the Act provides for the payment of money judgments and settlements against a Senate office by the Senate through funds appropriated for that purpose, and not by the Senator, *see* CAA § 415 (2 U.S.C. § 1415), thus providing that judgments will be paid regardless of the expiration of a Senator's term.[12]

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[12] While a claim for equitable relief (such as an order of reinstatement) may indeed become moot after the Senator's term has expired, Hanson expressly disclaimed any request for equitable relief early in this suit, stipulating that he is seeking only monetary damages. *See* Plaintiff's Stipulation to Accept Front Pay in Lieu of Reinstatement filed Oct. 30, 2003, J.A. 20-22.

The Employing Office relies for its mootness argument on the fact that the CAA specifies that the defendant in suits under the Act "shall be the employing office." *Id.* § 408(b) (2 U.S.C. § 1408(b)). Denominating the employing office as the defendant, however, merely indicates where the offending action is alleged to have occurred but has no significance on whether Congress intended a suit to abate after a Member left office.[13]

The employing office is nothing more than an administrative unit of the Senate; it is the Senate that provides the resources for the vigorous defense of suits[14] and for the payment of judgments. To abate a suit on the basis that the office is the nominal defendant is an exaltation of form over substance that should be rejected.[15] *Cf. Thompson v. United States*, 103 U.S. 480, 484 (1880) ("[I]f we regard the substance and not the mere form of things, a proceeding like the present, instituted against a township clerk, as a step in the enforcement of a township duty to levy the amount of a judgment against it, ought not to abate by the expiration of the particular clerk's term of office," as "[t]he whole proceeding is really and in substance a proceeding against the township, as much as if it were named").

Moreover, the Employing Office's argument would produce arbitrary distinctions in the remedies afforded to

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[13] The Employing Office points out that, as set forth in the Senate administrative handbook, once a Senator's term expires, his or her office "cannot incur any financial obligations," stops receiving mail from the Senate Post Office, must "vacate the physical office space," and must settle its accounts with Senate support services. Brief for Appellant at 17-18. Yet, even after the Senator leaves office, the Senate continues to pay all financial obligations incurred during the Senator's term — including any liability of the office arising out of personnel actions taken during the Senator's term.

[14] *See Legislative Branch Appropriations, 2006*, S. Rep. No. 109-89, at 16 (2005) (Senate Chief Counsel for Employment provides "representation of Senate offices in all areas of employment law").

[15] Tellingly, under the CAA, staff in Senators' offices are considered "employee[s] of the Senate," CAA § 101(8) (2 U.S.C. § 1301(8)), and not of any specific employing office. Hence, an action against their employer is, in essence, an action against the Senate.

congressional employees. The Employing Office's view would make a Member's office essentially immune from liability for CAA claims within the Member's final years in Congress, as any lawsuit for adverse employment actions during that period would not reach final resolution prior to the Member's leaving office. Indeed, in two of the four reported CAA suits against the office of a Member of Congress — this case and the *Bastien* case — the term of the Senator whose office was the defendant expired before the case even proceeded to trial. Such an interpretation of the Act would leave a Senate employee's ability to seek redress for adverse employment actions subject to the vagaries of the timing of his or her Member's service in the Senate. The Employing Office's position also leads to the anomalous result that CAA suits brought by employees in Members' personal offices would abate with the expiration of the Member's term, yet suits by employees in other offices (e.g., committee staff and employees of House and Senate officers) would not. Nothing in the Act or its legislative history evinces any intent by Congress to provide a less effective remedy to one set of employees than another. To the contrary, a central purpose of the CAA was to provide a uniform effective remedy to all congressional employees.

Not only does abatement contradict Congress's intent in enacting the CAA, but it also serves no purpose here. The reason a suit abates when a defendant ceases to exist is because without a defendant "there is no one to respond to a judgment which might be or has been entered in a case," and thus, "the futility of . . . continuing is evident." *Acheson v. Fujiko Furusho*, 212 F.2d 284, 288 (9th Cir. 1954). As this appeal demonstrates, the Employing Office maintains ample existence to defend vigorously this action. In addition, any judgment against that office would be satisfied by the Senate from a separate fund authorized by the CAA. Hence, there is no merit to the suggestion that this case has ceased to be a live controversy from which plaintiff can secure meaningful relief.

III. THE SPEECH OR DEBATE CLAUSE DOES NOT BAR JURISDICTION OVER CAA SUITS

In extending federal employment protections to its workforce, Congress considered it vital to the "strong enforcement" of those protections that aggrieved employees have "the right for claims to be heard in court."[16] Indeed, many of the CAA's substantive protections already applied to the Senate under GERA, but those protections were "inadequate" because "the remedies that we provided were not the same remedies for Hill employees that private-sector employees have," *id.* at 884 (Sen. Grassley), particularly the right to bring a civil action in district court and receive a jury trial. In response to constitutional concerns over providing such a right of action, the CAA's sponsors explained their conviction that giving congressional employees the right to sue would not infringe on Members' Speech or Debate Clause privileges because, under this Court's teaching regarding judicial immunity in *Forrester*, 484 U.S. 219, personnel actions are not part of the due functioning of the legislative process protected by the Clause.

Congress's determination that it could regulate the employment rights of its own workforce in the carefully crafted scheme established by the CAA consistent with its role as a co-equal and independent branch of government and with its Members' Speech or Debate Clause privileges merits respect by this Court.

A. The Speech or Debate Clause Protects the Due Functioning of the Legislative Process

The Speech or Debate Clause of the Constitution provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. "The pur-

[16] 141 Cong. Rec. 659 (Sen. Lieberman); *see also id.* at 543 (Rep. Fawell) (noting that right to file civil suit is "what put[s] the 'teeth'" into employment laws); *id.* at 650 (Sen. Grassley) ("judicial enforcement . . . is vital" if the CAA's protections "are to meaningfully apply").

pose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). To further this goal of legislative independence, the Court has interpreted the Clause to protect from judicial inquiry activities that are an "integral part of the deliberative and communicative processes . . . with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972); *see also Doe v. McMillan*, 412 U.S. 306, 311 (1973) (Speech or Debate Clause protects "anything 'generally done in a session of the House by one of its members in relation to the business before it'") (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881)); *Eastland*, 421 U.S. at 501 (Clause covers acts "within the sphere of legitimate legislative activity").

The immunity provided by the Clause, where applicable, serves not merely as "a defense on the merits[,] but also protects a legislator from the burden of defending himself." *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969). The Clause also provides Members of Congress with a privilege against being compelled to testify or produce documents about legislative acts. *See Gravel*, 408 U.S. at 616 ("We have no doubt that Senator Gravel may not be made to answer — either in *terms of questions* or in terms of defending himself from prosecution — for the events that occurred at the subcommittee meeting.") (emphasis added); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995).[17]

While this Court has consistently "read the Speech or Debate Clause broadly to effectuate its purposes," *East-*

[17] To effectuate the Clause's purposes, the Court has held that the Speech or Debate Clause covers the actions of not only Members of Congress within the legislative sphere, but also congressional officers and employees when the conduct would be protected by the Clause if performed by a Member. *See Gravel*, 408 U.S. at 617-22; *Eastland*, 421 U.S. at 507.

land, 421 U.S. at 501, it also "has been careful not to extend the scope of the protection further than its purposes require." *Forrester*, 484 U.S. at 224. The Court has interpreted the scope of the Speech or Debate Clause's protections in light of the Clause's purpose "to insure that the *legislative function* the Constitution allocates to Congress may be performed independently." *Eastland*, 421 U.S. at 502 (emphasis added). Thus, the Clause's protections have been held to reach activities that are "clearly a part of . . . the *due* functioning of the [legislative] process," *United States v. Brewster*, 408 U.S. 501, 516 (1972), that is, those actions that are "an integral part of the deliberative and communicative processes by which Members participate in" legislative proceedings. *Gravel*, 408 U.S. at 625. However, in none of the Court's decisions has the Speech or Debate Clause's reach "been extended beyond the legislative sphere," *id.* at 624-25, to matters that merely relate to the legislative process. *Brewster*, 408 U.S. at 515 ("In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process.").

Not everything a Member does falls within the Clause's reach, as the fact "[t]hat Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. at 625. Thus, whether the Speech or Debate Clause bars jurisdiction over CAA claims by employees with legislative duties depends not on whether personnel actions are part of a Member's official duties, but on whether personnel actions are an integral part of a Member's participation in the legislative process.

B. Adverse Personnel Actions Against a Congressional Employee With Legislative Duties Are Not Themselves Part of the Due Functioning of the Legislative Process

Adverse personnel actions against congressional employees, including employees with some legislative duties, are not themselves part of "the *due* functioning of the

[legislative] process." *Brewster*, 408 U.S. at 516. While an employee's duties may support a Member's legislative function, the discharge of that employee is not itself "an integral part of the deliberative and communicative processes by which Members participate" in legislative proceedings. *Gravel*, 408 U.S. at 625. Thus, the Speech or Debate Clause does not bar jurisdiction over CAA suits challenging such personnel actions.

This Court's decision in *Forrester v. White* supports this conclusion. In *Forrester*, a former state probation officer brought suit against the state judge who had discharged her, alleging discrimination on the basis of sex in violation of 42 U.S.C. § 1983. 484 U.S. at 221. The judge moved for summary judgment on the ground of judicial immunity. *Id.* at 222. The district court granted that motion, and the court of appeals affirmed. *Id.* This Court reversed, holding that the judge was not entitled to judicial immunity. The Court explained that the immunity analysis depends on "the nature of the function performed, not the identity of the actor who performed it." *Id.* at 229. Hence, the fact that the employer was a judge acting within his official authority to discharge the probation officer did not answer the immunity question. *Id.* at 230. Rather, the immunity analysis required a determination of whether the discharge fell within those acts that the immunity was created to protect.

Judicial immunity, the Court explained, protects "judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants," *id.* at 225 (citing *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 348 (1872)), the threat of which "would manifestly detract from independent and impartial adjudication." *Id.* at 226-27. Accordingly, the Court found that there was a distinction for immunity purposes "between judicial acts," which involve the adjudicative function, "and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Id.* at 227. Finding that the judge was not performing adjudicative functions in

discharging the probation officer, the Court held that he was not entitled to judicial immunity. *Id.* at 229-30.

As Congress recognized in crafting the CAA, *Forrester*'s analysis of the scope of judicial immunity supports Congress's constitutional power to provide its employees with a cause of action under the CAA. *See, e.g.*, 141 Cong. Rec. 884 (Sen. Grassley) (citing reasoning in *Forrester* in support of Congress's power to establish a civil action consistent with Speech or Debate Clause); *id.* at 1328-31 (Rep. Goodling) (submitting 1991 Congressional Research Service memorandum, which stated "[o]n the strength of *Forrester*, a persuasive argument can be made that the speech or debate clause does not encompass employment decisions"). As with judicial immunity, the scope of the immunity provided by the Speech or Debate Clause reflects the purpose it serves and the legislative function it protects. Just as in *Forrester*, where the discharge of a judicial employee was found to be outside of the judge's adjudicative function, so here the discharge of a congressional employee falls outside of the legislative process.

The fact that the congressional employee may have duties that support a Member's legislative functions does not affect that conclusion. The probation officer in *Forrester* directly supported the judge's judicial function by preparing pre-sentence reports, as well as developing recommendations for disposition and placement in juvenile cases. 484 U.S. at 221. Yet, this Court still found the discharge to be outside the judicial function because, even though the personnel actions at issue "may have been quite important in providing the necessary conditions of a sound adjudicative system," such acts are nevertheless "not themselves judicial or adjudicative." *Id.* at 229. Similarly, while personnel actions affecting a congressional employee with legislative duties may be incidentally related to legislative affairs, those personnel actions are not themselves an "integral part of the deliberative and communicative processes by which Members participate" in legislative proceedings, *Gravel*, 408 U.S. at 625, and thus are not protected by the Speech or Debate Clause. *See*

Brewster, 408 U.S. at 528 ("The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself.").[18]

C. Congress Structured the CAA's Remedial Scheme to Preserve Members' Privileges and to Avoid Intruding Into Members' Independent Performance of Their Legislative Functions

By enacting the CAA, Congress determined that shielding adverse personnel actions from judicial scrutiny was not necessary to preserve the legislative independence of Members. At the same time, Congress recognized that specific proceedings and remedies in some CAA cases could, in their application, intrude upon Members' independence in carrying out their legislative duties. Accordingly, Congress structured the CAA's remedial scheme to insulate Members' legislative activities from intrusion.

First and foremost, Congress expressly provided that the Speech or Debate Clause privilege of Members is fully applicable in CAA suits. Section 413 of the Act (2 U.S.C. § 1413) provides, in pertinent part, "The authorization to bring judicial proceedings under sections 405(f)(3), 407, and 408 shall not constitute a waiver . . . of the privileges of any Senator or Member of the House of Representatives under article I, section 6, clause 1, of the Constitution . . . ." The reserved privilege protects Members against attempts to compel testimony or evidentiary production arising from their legislative duties, such as in discovery in a civil action under section 408 or in response to subpoenas issued by the administrative tribunal in proceedings conducted pursuant to section 405(f)(3). In addition, the Speech or Debate privilege pro-

[18] The Employing Office's reliance on the presidential immunity recognized in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), fails because the contours of that immunity are based on the "unique position" of the President, *id.* at 749, and "the special nature of the President's constitutional office and functions." *Id.* at 756.

tects Members from remedies intruding into the performance of their legislative duties by either a district court in an action under section 408 or the court of appeals enforcing orders under section 407.

To interpret section 413's preservation of the Speech or Debate Clause privilege as a jurisdictional bar to CAA actions by all employees with any legislative duties, as the Employing Office argues, *see* Brief for Appellant at 10, 24, would mean that in enacting the CAA, Congress purported to provide its employees with a cause of action in section 408, only to take away that right from a large swath of those employees only five sections later in section 413. Such an unreasonable interpretation is contrary to the legislative history of the CAA and would undermine the Act's fundamental purposes to provide protections to all congressional employees and to educate Members about the operation of the laws they enact.[19]

Rather, applying the Speech or Debate privilege preserved in section 413 depends on the particular circumstances and facts as they develop in each case, and thus must be done, as all the judges in the D.C. Circuit's en banc decision recognized, on a case-by-case basis on a factual record before the district court.[20] Indeed, in a particular case, the privilege recognized in section 413 might result in dismissal of an employee's lawsuit from an inability of the employee to access necessary (yet protected) legislative information. That privilege, as the Court of Appeals recognized, also may prevent inquiry into the

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[19] The suggestion made below, *see* J.S.App. 27a, 459 F.3d at 17, that employees who would be barred from filing suit in court could nonetheless seek redress through the Office of Compliance administrative procedure, CAA § 405 (2 U.S.C. § 1405), fails to account for the fact that the Office of Compliance, which is independent of the House and Senate, is "any other Place," U.S. Const. art. I, § 6, cl. 1, where, under the Speech or Debate Clause, Members cannot be questioned about legislative acts.

[20] *See* J.S.App. 24a-27a, 459 F.3d at 15-17; J.S.App. 28a-29a, 459 F.3d at 18 (Rogers, J., concurring in part and in the judgment); J.S.App. 31a, 35a, 459 F.3d at 18, 21 (Tatel, J., concurring); J.S.App. 56a-57a, 459 F.3d at 32 (Brown, J., concurring in the judgment).

motivations behind personnel actions to the extent they are part of the due functioning of the legislative process. *See* J.S.App. 21a-26a, 459 F.3d at 14-16. But, as discussed above, the Clause does not *automatically* bar suits by legislative employees nor prevent a court from reviewing non-legislative reasons for an employee's termination.

Indeed, the Employing Office concedes that not all CAA actions by employees with legislative duties are barred by the Speech or Debate Clause, noting that a claim of hostile work environment could proceed, as it is not predicated on and does not question a legislative act. Brief for Appellant at 31-32. There is no logical reason for limiting this understanding to hostile work environment claims, as a variety of claims under the CAA may not implicate legislative decision-making. For example, as the D.C. Circuit recognized, Hanson's claim to overtime compensation under section 203 of the Act (2 U.S.C. § 1313), does not inherently present Speech or Debate issues. *See* J.S.App. 24a, 459 F.3d at 15 n.25.[21]

Moreover, facts in controversy pertinent to Hanson's claim under the Americans with Disabilities Act appear susceptible to adjudication without delving into the legislative sphere. *Compare* Complaint para. 9-14, 18-19, J.A. 12-14 (Hanson alleges he was fired *after* disclosing heart condition) *with* Answer to Complaint para. 9-10, filed Sept. 21, 2004, district court dkt #21 (Employing Office

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[21] The Employing Office argues that Hanson's overtime claim is barred by the Speech or Debate Clause because determining whether an employee is exempt from overtime pay requires an examination of that employee's duties, and when the employee has some legislative duties, such an examination constitutes "questioning about legislative acts because the job duties are legislative acts." Brief for Appellant at 40. Not only is this argument contrary to Speech or Debate Clause precedent, which requires a court to examine whether the action at issue constitutes an integral part of the legislative process, but it also contradicts the Employing Office's own test for applying the Clause in CAA cases, which would require, at a minimum, an examination of an employee's duties to determine if any are legislative and, thus, whether the personnel action involving that employee was a legislative act covered by the Clause.

asserts that Hanson was discharged *before* disclosing heart condition). It is unclear how litigating that factual issue, any more than litigating the facts in a hostile work environment case, would intrude into the Senator's legislative functions. More generally, employment cases by their very nature involve a wide range of factual circumstances that would need to be evaluated in each particular suit to determine whether a claim could be litigated without infringing on the legislative sphere.

To insulate Members further from intrusion into legislative independence, Congress provided that suits under the Act could be brought only against an employing office and not against any Member personally.[22] Because it is the employing office that is subjected to suit, it is that office — not an individual Member — that may be held liable and against whom any judgment would be entered.[23] In addition, the funds that pay any judgment against an employing office in a discrimination action do not come from the Member personally, nor from the funds allotted to the employing office; rather, the CAA provides for payment of any awards or settlements from a separate judgment fund in the Treasury established for this purpose. *See* CAA § 415 (2 U.S.C. § 1415).

Furthermore, final approval of all settlements under the CAA rests with the Executive Director of the Office of Compliance, *not* with the individual Member whose

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[22] CAA § 408(b) (2 U.S.C. § 1408(b)); *see* 141 Cong. Rec. 1337 (1995) (Rep. Fawell) ("[N]o Member of Congress may be personally sued, that is, such a suit would be against an employee's employing office, a term of new art which avoids naming any Member of Congress as the specific responding party to such a law suit.").

[23] To the extent that an employing office itself has Speech or Debate immunity – as Congress and its committees undoubtedly do, *see Newdow v. U.S. Congress*, 328 F.3d 466, 484 (9th Cir. 2003), *rev'd on other grounds*, 542 U.S. 1 (2004); *Eastland*, 421 U.S. at 501 – that immunity, like the sovereign immunity of the employing office, was waived by the Senate and House in enacting the CAA. Indeed, section 413 expressly preserves the Speech or Debate Clause privilege only for "Senator[s] and Member[s] of the House of Representatives," 2 U.S.C. § 1413, not for any institutional entities such as the employing office.

employing office is the defendant. *See id.* § 414 (2 U.S.C. § 1414). And, under the CAA, both the House and Senate maintain the authority to establish rules "governing the process by which a settlement may be entered into . . . by any employing office." *Id.* Thus, the settlement of CAA actions is not within the ultimate control of the Member, but of the Senate and House, as well as the Office of Compliance.

Accordingly, as Members are not the subject of court judgments, do not pay any awards or settlements, and do not have final authority to settle claims, the Act insulates Members from being "questioned" as defendants in lawsuits. Combined with the Speech or Debate privilege preserved in section 413, Congress has created a remedial scheme in the CAA that provides needed workplace protections to its employees while carefully protecting its Members' legislative functions.

D. The Court Should Respect Congress's Determination That Suits Against Employing Offices Under the CAA Do Not Infringe on Members' Speech or Debate Clause Immunity

Because Congress "is a coequal branch of government whose Members take the same oath [as judges] to uphold the Constitution," this Court accords "deference" to "the judgments of Congress" in enacting legislation, particularly when Congress considered the very question before the Court. *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). In enacting the CAA, Congress considered at length the constitutional issues raised by the Act, and took "[g]reat care" to structure the enforcement scheme so as "to maintain the integrity of Congress as a separate branch of Government." 141 Cong. Rec. 684 (1995) (Sen. Roth).

The Act's sponsors specifically considered Speech or Debate Clause concerns, concluding "that [the Clause] should not and cannot provide Members of Congress with immunity for illegal employment actions . . . in our capacity as employers of those who work for and with us here on Capitol Hill." *Id.* at 957 (Sen. Lieberman). In-

deed, the Act's sponsors specifically relied on the Court's decision in *Forrester* as support for their conclusion that personnel actions by Members of Congress are not part of the legislative process and, thus, are not protected by the Speech or Debate Clause. *See id.* at 884 (Sen. Grassley).

The Court should give special deference to Congress's action in this case because the immunity at issue pertains only to Congress and its Members. Congress has both the most experience with application of that immunity and the greatest interest in protecting a full and robust scope for its immunity. *See McConnell v. FEC*, 540 U.S. 93, 137 (2003) (according "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise"). Just as this Court recognized in *Forrester* that judges were "inevitably more sensitive to the ill effects that vexatious lawsuits can have on the judicial function," 484 U.S. at 226, so the Court can expect Congress to be equally solicitous of its own immunities. Congress's "expressed decision . . . that employment decisions of Members can be placed outside coverage of the [Speech or Debate] clause" constitutes "a determination by the body most familiar with the issue," which "should be entitled to special deference by the courts." 141 Cong. Rec. 958 (Sen. Lieberman) (quoting Congressional Research Service memorandum).

Congress's enactment of the CAA also merits heightened deference because it involves Congress's own workplace. The CAA does not affect the public at large, or either of the other two branches of government, but concerns a matter of governance within the Legislative Branch. Congress's decision on how to provide federal employment protections for its own employees should be respected by the Judicial Branch. *See id.* at 884 (Sen. Grassley) ("The bill was crafted to take into account constitutional issues," and courts should "permit Congress to exercise these powers against its own activities").

Accordingly, this Court should respect Congress's considered determination that it can provide its own employees with a right to bring civil suits against their employ-

ing office to vindicate their fair employment rights without infringing on Members' Speech or Debate privileges.

CONCLUSION

For the foregoing reasons, the Court lacks jurisdiction over this appeal. If the Court does reach the merits of this case, it should affirm the judgment below because the case has not become moot and the Speech or Debate Clause does not bar jurisdiction over this suit.

Respectfully submitted,

MORGAN J. FRANKEL,
(Counsel of Record),
Senate Legal Counsel,
PATRICIA MACK BRYAN,
Deputy Senate Legal Counsel,
GRANT R. VINIK,
THOMAS E. CABALLERO,
Assistant Senate Legal Counsel,
Counsel for United States Senate

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SUPREME COURT OF THE UNITED STATES

OFFICE OF SENATOR MARK DAYTON,
Appellant,

v.

BRAD HANSON,
Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBA CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF APPELLEE

THOMAS W. OSBORNE*
AARP FOUNDATION LITIGATION

MELVIN RADOWITZ
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae* AARP
*Counsel of Record

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INTEREST OF *AMICUS CURIAE*[1]

AARP is a nonpartisan, nonprofit membership organization of more than 38 million people aged 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports and defends the rights of older Americans and the laws and public policies designed to protect them. Approximately one half of AARP's members remain active in the work force and are covered by the federal laws protecting their fundamental civil rights in the work place including, *inter alia*, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act. By enacting the Congressional Accountability Act (CAA) in 1995, Congress finally conferred the protections of these laws on thousands of congressional employees, none of whom had been previously covered. Congress' belated decision to extend civil rights protections to its employees more than thirty years after enactment of Title VII should be accorded great deference. Indeed, in enacting the CAA Congress specifically considered the question central to this case: whether the CAA violates the Speech or Debate Clause of the Constitution. Congress concluded that it does not because an employment decision is not a legislative act that would be protected by the Speech or Debate Clause. AARP files this brief *amicus curiae* in support of Appellee Hanson because the decision to work on behalf of the American people as an employee of the legislative branch of government in the

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[1] No counsel for any party authored any portion of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. The written consents of the parties have been filed with the Clerk of the Court pursuant to SUP. CT. R. 37.2(a).

office of a member of the U.S. Senate or House of Representatives should not require an individual to forego the protections of the work place civil rights laws enjoyed by virtually all other American workers.

SUMMARY OF THE ARGUMENT

The CAA is a decision by Congress about how to regulate its own internal functioning. The Act and Congress's considered determination that it does not violate the Speech or Debate Clause is, therefore, entitled to significant deference. Indeed, to conclude that Congress's decision to subject its members to employment discrimination suits is barred by the Speech or Debate Clause is to force upon Congress an immunity that it decided was inapplicable and unnecessary.

Contrary to Appellant's argument, the decision of the Office of Senator Dayton to fire Hanson was not constitutionally privileged simply because Hanson's position was *related* to the legislative process. The Court of Appeals concluded instead that the privilege applies only to conduct that is "part of, or integral to, the due functioning of the legislative process." *Hanson v. Office of Sen. Mark Dayton*, 459 F.3d 1, 12 (D.C. Cir. 2006). In reaching this conclusion, the Court of Appeals rejected as erroneous its own analysis in a previous decision in which it concluded that an employment decision becomes part of the legislative process as a result of the employee's duties – the very argument that Appellant relies on here. Rather, the Court of Appeals rightly concluded that a decision to hire or fire any employee is simply an administrative act that legislators, judges, presidents, and private employers perform every day; it is not a legislative act protected by the Speech or Debate Clause.

I. THE COURT SHOULD DEFER TO CONGRESS'S DETERMINATION THAT THE CAA DOES NOT VIOLATE THE SPEECH OR DEBATE CLAUSE.

In enacting the CAA, Congress itself concluded that an employment action, such as firing a congressional aide, is a *not* a core legislative duty of a member of Congress protected by the Speech or Debate Clause. Appellant has identified no valid basis upon which this Court can reject this considered judgment.

This Court has stated that "[j]udging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that [a court] is called upon to perform.'" *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)). The reviewing court must "afford the legislation great deference." *Oklahoma v. United States*, 161 F.3d 1266, 1269 (10th Cir. 1998). This is not simply a polite gesture, but "a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power." *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953).

"The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). In this context, "the rational and practical force of the presumption [that a law is constitutional] is at its maximum." *Five Gambling Devices*, 346 U.S. at 449.

Congress clearly, and repeatedly, has concluded that the Speech or Debate Clause is no barrier to the application of federal laws to employment actions by members of the Legislative Branch. The Civil Rights Act of 1991, for example, subjects Congress to requirements similar to those created by the CAA. *See* 2 U.S.C. § 601 (applying Title VII of the Civil Rights Act of 1964 to Congress). During the debate over this Act, Senator Rudman raised a point of order that judicial review of Senate employment decisions would be unconstitutional under the Speech or Debate Clause. *See* 136 Cong. Rec. S9339-72 (daily ed. July 10, 1990) (statement of Sen. Rudman). The Senate overwhelmingly rejected the point of order, *id.*, and thereby took a firm position rejecting the argument that "Congress is limited by the Speech or Debate Clause in vesting jurisdiction in the Judicial Branch to rule on claims of employment discrimination." *Congressional Coverage Legislation, Applying Laws to Congress: Hearing on S.29, S.103, S.579, S.2071, S.2194 Before the S. Comm. on Govt'l Affairs*, 103rd Cong. 307 (1994) (Statement of Michael Davidson, U.S. Senate Legal Counsel).

In the 103rd Congress, a bipartisan committee, the Joint Committee on the Organization of Congress, was established, in part, to consider whether Congress should apply the laws it enacts to itself. During hearings on this issue, Senator Grassley testified that:

> I am of the view - shared by a research division of the Library of Congress, as well as a private law firm I asked to look into the issue several years ago - that we don't have speech and debate immunity for hiring and firing employees and for the conditions of our offices. These issues are not at the core of our legislative duties. A

> member of Congress should not receive special treatment if he or she does not follow civil rights or other labor laws.

Application of Laws and Administration of the Hill: Hearing Before the Jt. Comm. on Organization of the Cong., 103rd Cong. 25-26 (1993); *see also id.* at 35 (Rep. Fawell) ("I do not believe that the speech and debate clause of the Constitution, Article I, Section 6, prevents enforcement of Federal labor and/or civil rights laws on Members of Congress in their capacity as employer."). This conclusion was endorsed in the Joint Committee's Report. *See* H.R. Rep. No. 103-113, at 22 (1993).

The following year, three bills were introduced in the 103rd Congress concerning congressional accountability–H.R. 4822, S. 1824, and S. 2071. In the House debates on H.R. 4822, numerous Representatives, and a House Committee Report, expressly rejected the argument that congressional compliance laws were invalid under the Speech or Debate Clause. *See* 140 Cong. Rec. H7339 (daily ed. Aug. 10, 1994) (statement of Rep. Swett) (observing that H.R. 4822 addressed all constitutional concerns); *id.* at H7344 (statement of Rep. Rose) (bill did not run afoul of Constitution); *id.* at H7350 (Statement of Rep. Sanders) ("[T]he authors of the bill, and the committees which are bringing it to the floor, have worked long and hard to devise enforcement mechanisms which respect both the Constitution's provisions and the rights of workers, and I believe that they have succeeded."); *see also* H. Rep. No. 103-650, at 1, 3 (1994). The House adopted the bill, over constitutional objections, by a vote of 427 yeas to 4 nays. *See* 140 Cong. Rec. H7370 (daily ed. Aug. 10, 1994).

In the Senate hearings concerning S. 2071, the forerunner of the CAA, Senator Levin observed that Congress would make itself subject to federal labor laws "without violating the principle of separation of powers, or the Speech or Debate Clause." Congressional Coverage Legislation, supra, at 3. This sentiment was echoed in the testimony the Senate received from scholars and advocates. Professor Nelson Lund of George Mason University Law School, for example, testified that:

> The legal issue before this Committee then reduces to just one question: Are employment-related decisions–such as hiring and firing congressional aides, setting their pay scales, and regulating the sexual atmosphere of the workplace–part of the legislative process, or are they official but non-legislative administrative decisions?
>
> It seems to me that the answer is perfectly clear. Employment decisions can be very important in facilitating the legislative process, but they are not part of that process.

Id. at 243-44. Although this bill was scheduled for a vote in the Senate the vote never occurred. 141 Cong. Rec. S451 (daily ed. Jan. 5, 1995) (statement of Sen. Lieberman).

In the brief debate over the CAA itself, Representative Goodling included in the record a 1991 Congressional Research Service Report, which concluded that the Speech or Debate Clause would not bar a suit under the Act because "hiring and firing practices are not legislative within the meaning of the clause." See 141 Cong. Rec. H265 (daily ed. Jan. 17, 1995) (statement of Rep. Goodling). In

addition, Senator Lieberman directly addressed speech and debate immunity, stating that:

> an illegal employment action would not be regarded by the courts as an act that is legislative in nature . . . . of course, this is just common sense that the speech-and-debate clause on its face would not seem to be a clause that would make us immune from the impact of the laws we adopt and impose on all other employers when we are acting as employers instead of as Members of Congress involved in legislation.

141 Cong. Rec. S701, S702 (daily ed. Jan. 10, 1995) (statement of Sen. Lieberman).

The text of the CAA confirms that Congress considered the impact of the Speech or Debate Clause and concluded that the constitutional immunity it provides would not generally bar actions under the CAA. The text prohibits employment actions such as those alleged in this case. 2 U.S.C. § 1311(a)(3). At the same time, in the privileges and immunities section of the Act, Congress provided that the CAA's "authorization to bring judicial proceedings . . . shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any Senator or Member of the House of Representative under article I, section 6, clause 1, of the Constitution." 2 U.S.C. § 1413. These provisions reflect that Congress viewed the Speech or Debate Clause as wholly reconcilable with the prohibitions of the Act.

The House considered, debated and passed the CAA *unanimously* in a single day, and the Act passed the Senate in simply a week with only Senator Byrd voting against it. *See*

141 Cong. Rec. H286 (daily ed. Jan. 17, 1995) (unanimous House vote on S.2); 141 Cong. Rec. S767 (daily ed. Jan. 11, 1995) (Senate vote); *see also* 141 Cong. Rec. H104 (daily ed. Jan. 4, 1995) (unanimous House vote on H.R.1). In these circumstances, deference to Congress's judgment about the constitutional question is both necessary and appropriate. *See Rostker*, 453 U.S. at 64.

Judicial deference is particularly appropriate here because the CAA governs Congress's own ethical conduct, an issue over which Congress has wholly unfettered discretion. *See* U.S. CONST., art. I, § 5 (committing to the House and Senate the power to determine rules of conduct governing their members). The CAA does not diminish individual rights nor does it undercut the voters' choice of a representative; it threatens no power of the judicial or executive branch. Thus, to clothe employment decisions with the speech or debate immunity would "force upon Congress an immunity that Congress itself does not believe is needed to protect its own independence." Nelson Lund, *Congressional Self-Exemption From the Employment Discrimination Laws: A Rational Choice Analysis of the Civil Rights Act of 1991*, 54 LA. L. REV. 1559, 1583 (1994).

II. THE TEXT AND HISTORY OF THE SPEECH OR DEBATE CLAUSE, AS WELL AS THE CASE LAW INTERPRETING IT, DEMONSTRATE THAT THE CLAUSE IMMUNIZES ONLY ACTS IN THE FORMAL LEGISLATIVE PROCESS.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place." U.S. CONST., art I, § 6, cl. 1. The text and history of this

Clause, as well as the case law interpreting it, demonstrate that it applies only to acts in the formal legislative process.

Thomas Jefferson long ago pointed out that "[the speech and debate privilege] is restrained to things done in the House in a Parliamentary course . . . For [the Member] is not to have privilege *contra morem parliamentarium*, to exceed the bounds and limits of his place and duty." T. Jefferson, A MANUAL OF PARLIAMENTARY PRACTICE (1800), *reprinted in* THE COMPLETE JEFFERSON 704 (S. Padover ed., 1943). Joseph Story wrote in his commentaries that "this privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty." 1 J. Story, COMMENTARIES ON THE CONSTITUTION § 866, at 630 (5th ed. 1891).

This Court has similarly held that the Speech or Debate Clause immunizes only formal legislative acts. The immunities "were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). The Court's test for whether conduct falls within the Speech or Debate Clause is whether the act is:

> an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel v. United States, 408 U.S. 606, 625 (1972). Only a "legislative act"–"an act generally done in Congress in relation to the business before it"–is immune from judicial review. *Brewster*, 408 U.S. at 512.

Applying this test, the Court has held that the Speech or Debate Clause immunizes "written reports presented in [the Congress] by its committees," "resolutions offered," and "the act of voting." *Kilbourn v. Thomson*, 103 U.S. 168, 204 (1880). Similarly, "a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries." *Doe v. McMillan*, 412 U.S. 306, 312 (1973). In addition, "[a] Member's conduct at legislative committee hearings . . . may not be made the basis for a civil or criminal judgment against a Member." *Gravel*, 408 U.S. at 624. Finally, speech and debate immunity encompasses "[t]he power to investigate and to do so through compulsory process." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975). These are all "act[s] resulting from the nature and in the execution of the office." *Kilbourn*, 103 U.S. at 203.

Acts that do not rise to this level of formality, however, have been repeatedly held to fall outside the Speech or Debate Clause. For example, even though members of Congress are frequently "in touch with [and seek to influence] the Executive Branch of the Government . . . [this] conduct, though generally done, is not protected legislative activity." *Gravel*, 408 U.S. at 625. Nor does the Speech or Debate Clause protect the dissemination of legislative materials "to the public at large." *Doe*, 412 U.S. at 316; *see Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979). The Court has explained that these activities are "political in

nature rather than legislative." *Brewster*, 408 U.S. at 512.

Examining its own cases and broad rhetoric, the Court has concluded that the Speech or Debate Clause "reach[es] *only* those things 'generally *done in a session* of the House by one of its members in relation to the business before it,' *Kilbourn v. Thompson*, 103 U.S. at 204, or things 'said or done by him, *as a representative*, in the exercise of the *functions of that office*,' *Coffin v. Coffin*, 4 Mass 1, 27 (1808)." *Brewster*, 408 U.S. at 512-13 (emphasis added).

In *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1302,1304 (10th Cir. 1994), *cert. denied*, 126 S.Ct. 396 (2005), a case brought under the CAA, the Tenth Circuit held that the Speech or Debate Clause bars judicial review of a Senator's allegedly discriminatory personnel decision only when the plaintiff's claim "question[s] the conduct of *official* Senate legislative business." (emphasis added). Indeed, in light of *Bastien*, the Court of Appeals in this case rejected its earlier holding in *Browning v. Clerk, U.S. House of Representatives*, 252 U.S. App. D.C. 241, 789 F.2d 923 (D.C. Cir. 1986), that the Speech or Debate Clause "protects those personnel decisions taken with respect to employees whose duties are 'directly related to the due functioning of the legislative process.'" *Hanson*, 459 F.3d at 11, quoting *Browning*, *id.* at 929.

Two years after *Browning* was decided, *Forrester v. White*, 484 U.S. 219 (1988), in which this Court concluded that a state court judge did not have absolute immunity from suit under 42 U.S.C. § 1983 for his decision to fire a subordinate court employee, cast doubt on *Browning*. Citing the narrowness of legislative immunity provided by the Speech or Debate Clause and presidential immunity under *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), *Forrester*

concluded that "judges are entitled to absolute immunity for 'judicial acts,' not 'administrative, legislative, or executive functions,' no matter how 'essential' such functions may be 'to the very functioning of the courts.'" *Hanson*, 459 F.3d at 7, quoting *Forrester*, 484 U.S. at 227, 228.

Citing *Forrester* and *Bastien*, the, the Court of Appeals concluded below that "an employee's duties are too crude a proxy for protected activity." *Hanson*, 459 F.3d at 11. The Court of Appeals pointed out that the "holding in *Browning* presumes that a personnel decision with regard to an employee whose duties are directly related to the due functioning of the legislative process . . . is always an integral part of the deliberative and communicative processes." *Id.* (Citations and internal quotation marks omitted). Relying on *Bastien*, the Court of Appeals rejected the presumption as "overinclusive and therefore inconsistent with the Court's practice of being 'careful not to extend the scope of the protection further than its purposes require.'" *Id.* Thus, "[w]hile there is no doubt a 'clear nexus' between a personnel decision involving an employee with legislative duties [as Appellant alleges Hanson's duties were] and the Member's 'ability to carry out his representative responsibilities effectively,' a 'nexus' alone is insufficient to trigger the protections of the Speech or Debate Clause." *Hanson*, 459 F.3d at 12 n. 20 (Internal citations omitted).

Rather, as the Court of Appeals correctly concluded, "[l]egislative immunity under the Speech or Debate Clause is limited to matters that are part of, or integral to, the due functioning of the legislative process." *Id.* at 12. Since it is not "necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation" of CAA, *id.* at 13 (Internal citations and quotation marks omitted),

Hanson's duties, even if they were "legislative" in nature, were not were not "part of, or integral to the due functioning of the legislative process" and, therefore, not protected by the Speech or Debate Clause. *Id.* at 12..

III. THE EMPLOYMENT ACTIONS COVERED BY THE CAA DO NOT FALL WITHIN THE SPEECH OR DEBATE CLAUSE.

Employment decisions covered by the CAA are not protected by the Speech or Debate Clause because, as this Court has made clear, the Speech or Debate Clause protects only acts in the formal legislative sphere–that is, acts "essential to the deliberations of the [Congress]." *Gravel*, 408 U.S. at 625. To be sure, "[e]mployment decisions can be quite important in facilitating the legislative process, but they simply are not part of it. Just like the gathering of documents for use in a congressional hearing, which the Court has said is outside the scope of the constitutional immunity, even the most important personnel decisions are simply a means of preparing for the legislative process." Lund, *supra*, at 1577. Indeed, personnel decisions are even more remote from the legislative process than gathering documents. Such decisions do not occur in or for a session of the legislative body; they do not become part of legislation; they do not impact the Congress as a whole. Rather, employment actions are part of the process of administering or managing an office. The fact that the management decision is made by a Senator or Representative is irrelevant; "[t]hat Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. at 625.

Deciding to fire an employee is qualitatively different from voting on legislation, preparing a committee report,

questioning a witness at a hearing, making a statement on the Senate floor, or attempting to persuade another legislator to join your position. The latter acts all implicate "things generally done *in a session* of the [Congress] by one of its members *in relation to the business before it*," *Hutchinson*, 443 U.S. at 126 (emphasis in original, internal quotations and citation omitted), while employment decisions relate, at best, to the administration of a particular office. In addition, judicial review of employment decisions, unlike review of votes or reports, does not "threaten the integrity or independence of the [Congress] by impermissibly exposing its deliberations to executive influence." *Gravel*, 408 U.S. at 625. An employment decision, after all, does not implicate the reason for *legislation*, but the motive behind a single legislator's staffing decision.

Even if the employee is important to the legislator, the decision to hire or fire that employee is not, itself, part of the legislative process. This conclusion is compelled by the Court's decisions in *Brewster*, *Hutchinson*, *McMillan*, and *Johnson*. In these cases, the Court was asked to decide whether a legislator's communication with constituents or the Executive Branch fell within the Speech or Debate Clause. Although the communications in each case were crucial to the legislator's policy stance, they were held to be outside of the Speech or Debate Clause. *See Brewster*, 408 U.S. at 512-13; *Hutchinson*, 443 U.S. at 130; *McMillan*, 412 U.S. at 313-14, 317; *United States v. Johnson*, 383 U.S. 169, 172 (1966).

For these reasons, numerous academics considering whether congressional accountability laws are barred by speech and debate immunity have concluded that subjecting members of Congress to liability for their employment decisions would not run afoul of the Speech or Debate Clause. *See e.g.*, James J. Brudney, *Congressional*

Accountability and Denial: Speech or Debate Clause & Conflict of Interest Challenges to Unionization of Congressional Employees, 36 HARV. J. ON LEGIS. 1, 55-56 (1999) (concluding that speech and debate immunity should not bar actions under the CAA); Lund, *supra*, at 1577 (characterizing this issue as "just about as clear as it can be"); Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 107 (1994) (concluding that the CAA successfully responds to any constitutional concerns).

Finally, it is erroneous to presume that congressional immunity for personnel actions is necessary to avoid interfering with the legislative process–specifically, to prevent members of Congress from hesitating before hiring and firing key employees or becoming distracted or burdened by litigation. As an initial matter, this Court in *Forrester* has already rejected this rationale as a reason for extending absolute immunity to the employment decision of judges. *See* 484 U.S. at 229-30 (holding that this argument "in no way serves to distinguish judges from other public officials who hire and fire subordinates"); *See also Clinton v. Jones*, 520 U.S. 681, 708-09 (1997) (risk of vexatious litigation insufficient to immunize the President from suit during his tenure in office); *Burns v. Reed*, 500 U.S. 478, 494 (1991) (risk insufficient to immunize prosecutor). There is no reason to believe that this potential for "interference" with official duties has special force when applied to the Legislative, as opposed to Judicial or Executive, Branch.

In addition, this argument has already been addressed by Congress. The CAA contains numerous provision specifically designed to avoid causing vexatious litigation that unduly distracts or burdens member of Congress. For

example, before any suit may be commenced, the allegedly aggrieved employee must submit to mediation before the Office of Compliance–an independent, nonpartisan office within the Legislative Branch that administers and enforces the CAA. 2 U.S.C. § 1401. In addition, the employee must commence the proceeding against the *employing office* of the Senator, Representative or legislative instrumentality whose conduct is at issue, not the individual Senator, Representative or legislative officer. *Id.* §§ 1405(a), 1408(b). The CAA *does not* authorize an award of punitive damages or civil penalties. *Id.* § 1316(c). Finally, damages awarded or settlements paid under the CAA are funded by an account of the Office of the Treasury, not the individual congressman. *Id.* § 1415(a). Congress's careful reconciliation of the competing interests should be determinative of this particular argument about undue burdens. *See* 141 Cong. Rec. S444 (daily ed. Jan. 5, 1995) (statement of Sen. Grassley) (observing that these provisions were a compromise to assuage all doubts about CAA's constitutionality); *id.* at S452 (statement of Sen. Lieberman) (observing that these provisions were added in response to constitutional objections).

Indeed, this "legislative interference" argument is actually constitutionally backwards. The theory of the CAA is that "Congress will write better laws when it has to live by the same laws it imposes on the private sector and the executive branch." 141 Cong Rec. H94 (daily ed. Jan. 4, 1995) (statement of Rep. Shays). The Act is designed to be "a reverse of the golden rule . . . . [The CAA] is saying let us do unto ourselves as we have done unto others." 141 Cong. Rec. S451 (daily ed. Jan. 5, 1995) (statement of Sen. Lieberman). Forcing legislators to comply with federal law, and potentially subjecting them to litigation for non-compliance, makes members of Congress better appreciate

the statutes they have passed and more, not less, likely to execute their constitutional functions in an informed and responsible manner. Thus, any potential the CAA has "to interfere" with a legislator's decision to hire and fire employees is a constitutional virtue of the Act, not a constitutional vice. *See* Lund, *supra*, at 1571-72.

No less than Thomas Jefferson and James Madison similarly observed that requiring Congress to live by its laws promotes democracy and the goals of the Constitution. Jefferson, in fact, opined that the Speech or Debate Clause was worded narrowly so that Congress could be held to its own laws:

> It was probably from [their] view of the encroaching character of privilege, that the framers of our constitution, in their care to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation, have only privileged 'Senators and Representative' themselves from . . .'being questioned in any other place for any speech or debate in either House.'

T. Jefferson, A MANUAL OF PARLIAMENT PRACTICE, *reprinted in* Padover, *supra*, at 702. Similarly, in the Federalist No. 57, James Madison astutely observed that Congress must subject itself to federal laws to maintain the confidence of the people:

> [T]hey can make no law which will not have its full operation on themselves and their friends as well as on the great mass of the society. This has always been deemed one of the strongest

> bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny.

THE FEDERALIST NO. 57, at 352-53 (James Madison) (Clinton Rossiter ed., 1961). To hold otherwise would wrongly frustrate Congress's constitutional regulation of itself.

CONCLUSION

For the foregoing reasons, this Court should conclude that employment decisions made by or on behalf of Members of Congress are not legislative acts immunized by the Speech or Debate Clause. It, therefore, does not bar jurisdiction of suits by congressional employees pursuant to the Congressional Accountability Act. Consequently, congressional employees can vindicate their work place rights in court like nearly all other American workers.

Dated: April 3, 2007

Respectfully submitted,

Thomas W. Osborne
(Counsel of Record)
AARP Foundation Litigation

Melvin Radowitz
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae*
AARP

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OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

On appeal from the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CONGRESSMEN BARNEY FRANK AND CHRISTOPHER SHAYS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

VIRGINIA A. SEITZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

GLEN D. NAGER
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

TRACI L. LOVITT
Counsel of Record
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Pursuing the "principle that 'legislators ought . . . generally to be bound by [the law] as are ordinary persons,'" *Davis v. Passman*, 442 U.S. 228, 246 (1979) (internal citation omitted; alterations in original), the Congressional Accountability Act of 1995 ("CAA"), 2 U.S.C. §§ 1301-1438, makes twelve federal statutes establishing workplace rights and protections applicable to the Legislative Branch of the United States. The theory is that "Congress will write better laws when it has to live by the same laws it imposes on the private sector and the executive branch." 141 Cong. Rec. H90-02, H94 (daily ed. Jan. 4, 1995) (statement of Rep. Shays). *Accord* 141 Cong. Rec. S452 (daily ed. Jan. 5, 1995) (statement of Sen. Lieberman) ("[T]he CAA is saying let us do unto ourselves as we have done unto others.").

Congressman Barney Frank is a Democrat representing Massachusetts's Fourth District. Congressman Christopher Shays is a Republican representing Connecticut's Fourth District. Like Senator Dayton, Congressmen Frank and Shays benefit from, and strongly care about, the protections provided by the Speech or Debate Clause. But Congressman Shays was one of the primary sponsors of CAA legislation. Both he and Congressman Frank worked vigorously for the CAA's passage in 1995, and have strongly supported its effective enforcement. Amici wish to provide the Court with the view of concerned legislators on the issues presented.

Amici take no position on the merits of Hanson's complaint against the Office of Senator Mark Dayton ("the Employing Office" or "appellant"). But, Amici oppose the Employing

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[1] Pursuant to Supreme Court Rule 37.6, Amici state that no counsel for a party authored this brief in whole or in part, and no person or entity other than Amici has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Office's assertions (i) that a CAA claim is mooted or automatically abated when a Member's term of office expires (*see* Br. 16-22; Suggestion of Mootness 1), and (ii) that the Speech or Debate Clause requires dismissal of CAA claims where the plaintiff's "job duties [a]re part of the due functioning of the legislative process." Juris. Statement 7; *see also* Br. 23-47.

As demonstrated below, the Employing Office's arguments are wrong and misunderstand both constitutional doctrine and the CAA. Congress purposefully designed the CAA to avoid potential mootness and immunity issues in a constitutional manner. Any contrary holding would emasculate the CAA and frustrate its purpose—to improve our democratic government by subjecting Members of Congress to the same legal burdens that they impose on the private sector and Executive Branch.

SUMMARY OF ARGUMENT

The CAA was carefully designed to require Congress to live by laws it imposes on others, while protecting the independence and speech and debate immunities of its Members. Under the CAA, individual Members of Congress are not subject to suit or damage awards. Rather, potential plaintiffs must commence proceedings against a federally-created entity known as the "employing office" that is charged with executing personnel decisions; damages are recoverable and expenses are paid only from an independent account maintained by the Department of the Treasury; and an independent nonpartisan office within the Legislative Branch administers and enforces the Act.

In light of the CAA's design, actions under it are not mooted, or alternatively abated, by the expiration of a Member's term of office. Indeed, the continued holding of office neither is necessary to the continued legal existence of the "employing office" nor is required to recover damages from the U.S. Treasury. In addition, as the briefing in this

case amply demonstrates, defense counsel in a CAA action is not hired by, nor representing, individual Members of Congress but the entity known as the "employing office" and will continue to represent an employing office even after a Member's term expires. Thus, this case presents a live controversy, hotly contested by interested parties and advocates.

These same attributes of the CAA avoid the Speech or Debate Clause infirmities that the Employing Office erroneously asserts here. Under this Court's well-established precedent, the Speech or Debate Clause applies only to "legislative acts" of Members or their aides, such as acts of voting, statements made during committee proceedings, issuance of congressional subpoenas and the like. It does not apply to acts that are not themselves aspects of the legislative process, even if those acts are performed by the Member (or an aide) in an official capacity, and even if the acts have some nexus to legislative functions. And, where applicable, the immunity of the Clause runs only to Members and their aides; it does not run to other Legislative Branch officials or entities who carry out or implement legislative acts.

The actions covered by the CAA—personnel actions of an "employing office"—are not "legislative acts" of a Member or an aide. While employment actions facilitate the legislative process, they are not part of it; rather, they are part of the process of administering and managing a congressional office. The pertinent case law confirms this conclusion. In *Forrester v. White*, 484 U.S. 219 (1988), this Court held that personnel actions of judges are "administrative acts," and thus not subject to analogous common law immunities even where the administrative act is "essential" to "the very functioning of the courts." *Id.* at 228.

Appellant's contrary argument, that the Speech or Debate Clause bars judicial scrutiny of personnel decisions concerning employees whose duties are "directly related to the due functioning of the legislative process," is based on an

overly-broad reading of the Clause that is not supported by this Court's jurisprudence. Appellant's reliance on the Court's decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), is misplaced given the distinct design of the CAA and certain unique aspects of the institution of the Presidency.

In addition, appellant wrongly argues that the Speech or Debate Clause requires dismissal of this action to prevent *inquiry* into legislative acts—an argument that seeks both to expand the scope of the Clause's testimonial privilege and to convert it into an immunity of its own force. The lower court's consideration of this issue was premature given that no testimonial privilege has yet been asserted. In any event, this Court's jurisprudence makes clear that the Clause's testimonial privilege merely protects Members from having to testify involuntarily about a legislative act. It does not require the outright dismissal of a suit that does not allege the illegality of a legislative act, and does not prohibit a Member from voluntarily providing a defense to an action and being cross-examined about that defense.

Any doubt about the CAA's constitutionality should be resolved in favor of the CAA and against the invocation of immunity. Like all federal statutes, the CAA is entitled to a strong presumption of constitutionality. Here, that presumption is particularly deserved, since Congress has thoroughly evaluated and decided the precise constitutional questions in issue. This Court should not abate a lawsuit that Congress thought should survive; and the Court should not force upon Congress an immunity that Congress itself did not believe necessary to protect its independence.

ARGUMENT

I. THIS CASE PRESENTS A LIVE CONTROVERSY AGAINST A PROPER PARTY.

In its order of January 19, 2007, this Court directed the parties to brief, among others, the question "was this case

rendered moot by the expiration of the term of office of Senator Dayton?" In response, the Employing Office (Br. 16-22) has asserted that the action no longer presents a justiciable controversy because it has been abated—an affirmative defense that arises when there is no longer a proper party capable of pursing a suit. Contrary to the Employing Office's suggestion, mootness and abatement are separate legal doctrines. *See, e.g., Int'l Union, UAW v. Telex Computer Prods., Inc.*, 816 F.2d 519, 521-22 (10th Cir. 1987); *Nat'l Treasury Employees Union v. Campbell*, 654 F.2d 784, 787 (D.C. Cir. 1981) (criticizing party for confusing mootness with abatement). Moreover, under both principles of mootness and principles of abatement, this case continues to present a live controversy against a proper party.

A. CAA Actions Are Not Mooted By The Expiration Of A Member's Term.

The CAA's structure and purposeful design demonstrate that an action is not mooted by the expiration of the term of a Member. The lawsuit against the Employing Office rendering the employment decision at issue remains live and contested.

Under this Court's precedent, the burden of demonstrating mootness "is a heavy one." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). "[A] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal quotation marks omitted). Thus, in *Powell v. McCormack*, 395 U.S. 486, 496-99 (1969), this Court held that an action challenging the exclusion of a member-select from his congressional seat was not mooted by the expiration of the session of Congress and the plaintiff's being seated in a subsequent session because the Representative's interest in back pay was "still unresolved and hotly contested by clearly adverse parties."

Plainly, here, a live controversy between adverse parties exists. Under the CAA, the defendant is *not* the Member of Congress, but a legal entity termed the "employing office" that is charged with executing personnel decisions and serving as a defendant in suits. 2 U.S.C. §§ 1301(9), 1405(a), 1408(b). Nothing in the text or structure of the CAA makes the legal existence of the "employing office" depend on a Member's continued term of office. The *only* limit vis-à-vis the employing office is that actions against it must be asserted within statutorily specified time periods. *See id.* §§ 1402-1404. Reading into the statute the additional limit that the Member must occupy the office lacks any proper legal basis. *See, e.g., Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

In addition, there is still an available remedy, because damage awards and settlements are not funded by the Member's personal office funds but by an independent account maintained by the Department of the Treasury. 2 U.S.C. § 1415(a). Appropriations under this account do not depend on a Member's continued term of office; the CAA expressly authorizes appropriation of "such sums as may be necessary for administrative, personnel, and similar expenses of employing offices which are needed to comply with [the Act]." *Id.* § 1415(b). Thus, even though the term of the Member has expired, the plaintiff still has an interest in a damage awarded against an adverse party, the Employing Office itself.

The U.S. Senate Handbook confirms this understanding. It recognizes that actions under the CAA are brought against an entity called the employing office, not against individual legislators. *See* Senate Comm. on Rules and Administration, U.S. Senate Handbook I-8 to I-11 (1996). In addition, the Office of Senate Chief Counsel for Employment is tasked with defending employing offices of Senators, *id.* at I-23, and nothing in the Handbook suggests that this representation depends on the continuation of the Senator's term. The

Handbook also confirms that any judgments will be satisfied "from funds appropriated . . . for that purpose," not by "[i]ndividuals [or] Senate offices." *See id.* at I-11. It further provides for the payment of all "expenses incurred up to and including the Senator's last day of service." *Id.* at I-95 (Br. 10a). This provision naturally allows for the payment of back pay, the obligation for which is incurred during the Member's term.

Thus, despite Senator Dayton's departure from office, the Employing Office still exists as a legal entity that made an employment decision and is capable of being sued; a damages remedy can still be obtained from the U.S. Treasury; and, the Employing Office can continue to enjoy zealous representation. The case is not moot.

B. Alternatively, CAA Actions Are Not Abated By The Expiration Of A Member's Term.

Despite Hanson's clear continuing interest in a damages award, the Employing Office argues that the expiration of Senator Dayton's term of office has caused this action to abate automatically, such that it must be dismissed absent an express clause saving the action. This alternative argument is legally and factually erroneous.

As a matter of law, this Court has held that "[w]here a plea in abatement is relied upon, the burden of proof rests upon the defendant" to demonstrate abatement. *De Sobry v. Nicholson*, 70 U.S. 420, 423 (1865). In addition, the Court has recognized that abatement is automatic—and thus an action saved only by an express savings provision—in only two instances: when an individual defendant dies, *see List v. Pennsylvania*, 131 U.S. 396 (1888), or when a corporate defendant is fully dissolved under the relevant state or federal law, *see Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631 (1949). Where something short of death, either the physical kind or the formal kind occasioned by the operation of law, has occurred, this Court has held that

abatement is *not* automatic, and that the action should be maintained unless the defendant satisfies the burden of proving that Congress intended the action to abate. Thus, in *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 272-73 (1959), the Court held that no automatic abatement had occurred, because under the relevant state law, "the lives of these [defendant] corporations were not cut short, as is sometimes done on dissolution, but were sufficiently continued so that this proceeding did not abate." *Id.* (internal citation omitted). Moreover, the defendants had failed to prove that Congress intended its action to abate on something short of the defendant's complete death. *Id.*

The Employing Office misunderstands these legal principles by assuming that this action automatically abates—and thus requires dismissal absent an express savings clause—without satisfying its initial burden of proving that Congress has statutorily provided for the Employing Office's demise. The Employing Office erroneously relies (Br. 18-19, 21) on cases such as *Defense Supplies Corp.*, 336 U.S. at 637-38, and cases concerning the common law of abatement, where abatement had to be understood as automatic because Congress had *expressly* provided for dissolution of the government corporate defendant, and transferred all of the corporation's assets and liabilities to a successor. *See id.; see also Organic Cow, LLC v. Ctr. for New England Dairy Compact Research*, 335 F.3d 66, 72-73 (2d Cir. 2003) (Congress set expiry date for Commission); *Skolnick v. Parsons*, 397 F.2d 523, 525 (7th Cir. 1968) (Congress expressly terminated Commission). This assumption of automatic abatement is erroneous here, however, because there is no provision dissolving the Employing Office and, indeed, the Judgment Fund continues to be independently responsible for any damages awarded.

As a factual matter, the Employing Office clearly has not been dissolved. As in *Melrose*, here, an employing office remains a legal entity capable of being sued notwithstanding

the expiration of a Member's term of office, because there is *no* provision of law providing for its complete dissolution. Rather, under the Act, the "employing office" includes a host of entities in the Legislative Branch, such as the personal office of a Senator, 2 U.S.C. § 1301(9)(A), a House or Senate committee, *id.* § 1301(9)(B), or the Capitol Police Board, the Congressional Budget Office ("CBO"), and the Office of the Architect of the Capitol, *id.* § 1301(9)(D). Nothing in the statute purports to terminate an Employing Office or relieve it of liabilities incurred simply because a Member associated with it has left Congress. Indeed, in the context of a statutory scheme designed to teach Members of Congress about the benefits and burdens of their laws, Congress can hardly have contemplated that the right of a Senator's employee to pursue a CAA claim would disappear if the individual Senator left office, while an employee of the CBO, whose continuing existence is not dependent on the vagaries of election cycles, would never be at risk of losing the right to pursue his CAA claim. Thus, there is no provision for dissolution of an Employing Office, and the Judgment Fund remains independently responsible for any damages awarded, whether the Member remains in Congress or not.

The Employing Office attempts (Br. 17-18) to demonstrate its legal demise by arguing that it no longer has computer equipment, mailing capabilities, stationary, and a personal budget. This argument misses the point. While there may be provisions limiting its functions, there is no provision destroying the legal entity of the Employing Office, its responsibility for expenses and liabilities incurred prior to the Member leaving office (such as back pay), or its right to appropriations from the U.S. Treasury for defending against actions and paying damages. Thus, just as a corporation can continue to exist as a legal matter without an office building, employees, a budget, or even a business, *see City of Erie v.*

Pap's A.M., 529 U.S. 277, 288 (2000), so can and does the Employing Office.[2]

C. Adopting The Employing Office's Interpretation Of Mootness And Abatement Would Gut The CAA And Nullify The Protections Afforded Under It.

The construction of the CAA advocated by the Employing Office would render the Act's protections wholly illusory and defeat the goals of the CAA. Appellant's interpretation of the Act, for example, would free an employing office of responsibility for violations at the core of the CAA and leave the victim without the remedies that Congress provided, if a Member simply took the expedient step of resigning. Moreover, appellant's construction of the statute would essentially immunize the illegal acts of the employing office of any legislator who is not reelected to Congress, since (as this case demonstrates) the conduct of litigation (including all appeals) can easily take enough time to exhaust an entire term of a House member or a Senator. "[T]here is nothing to suggest that, in enacting [the CAA] . . . . Congress intended to hold out to [congressional employees] an illusory right for which it was denying them a remedy." *Graham v. B'hood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 240 (1949).

In addition, the Employing Office's interpretation of the CAA would nullify the protections afforded by the provisions of the Workers Adjustment and Retraining Notification ("WARN") Act and the Family Medical Leave Act

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[2] In a footnote (Br. 17 n.5), the Employing Office suggests that sovereign immunity requires strictly construing the CAA to limit the instances in which suits can be maintained. Congress, however, expressly waived sovereign immunity for actions brought pursuant to the CAA. *See* 2 U.S.C. § 1413. Nothing in section 1413 or elsewhere in the CAA provides that the waiver of sovereign immunity terminates when a legislator leaves office.

("FMLA") that were incorporated into the CAA. Under the WARN Act, "[n]o employing office shall be closed . . . until the end of a 60-day period after the employing office serves written notice of such prospective closing . . . to covered employees." 2 U.S.C. § 1315(a)(1). But if a Senator left office and the employing office did not timely issue a WARN notice, it would be impossible, as demonstrated in the penultimate paragraph of this section, for covered employees to vindicate their rights within 60 days even under the CAA's expedited procedure. Likewise, congressional employees do not become eligible for FMLA coverage until after they have "been employed in any employing office for 12 months." *Id.* § 1312(a)(2)(B). Under the Employing Office's view, if an individual is hired at the beginning of a one-term (or retiring) House Member's term and alleges an FMLA violation in the second year of the term, that employee will not be able to complete the grievance process related to his claim. This Court should not "accept [appellant's] interpretation of the statute . . . for it completely eviscerates the congressional goal of protecting" congressional employees in the workplace. *Bowsher v. Merck & Co.*, 460 U.S. 824, 836 (1983).

The Employing Office is wrong to argue (Br. 20) that the purpose of the CAA can be effectuated by the "expedited hearing procedures Congress provided to employees" through the Office of Compliance in 2 U.S.C. § 1405. Congress contemplated that employees would have a *choice* between initiating an action in federal district court and pursuing a claim through the Office of Compliance, *see* 2 U.S.C. § 1404, and appellant's argument eviscerates that right of choice.

Moreover, even under the supposedly "expedited" process managed by the Office of Compliance, an employee can expect to spend up to 375 days pursuing his claim, *not* including the additional time required for review by the Board of Directors of the Office of Compliance and/or the Federal Circuit and/or the Supreme Court, each of which may take an indeterminate period of time for its deliberations. *See id.*

§§ 1361(e), 1402(b), 1403(a), (c) (mandatory counseling and mediation periods shall each be 30 days long, with a 15-day wait between the two); *id.* § 1404 (following mediation, an employee has up to 90 days to elect to file a complaint with the Office of Compliance or in federal district court); *id.* § 1405(d)(2), (g) (if employee elects expedited process managed by the Office of Compliance, hearing may not begin for 90 days, and hearing officer has an additional 90 days to issue decision); *id.* § 1406(a) (employee may take 30 days to file a petition for review of adverse decision by hearing officer with the Board of Directors of the Office of Compliance). In short, including appellate review, this "expedited" process can take upwards of two years. *Cf.* Administrative Office of the U.S. Courts, *Judicial Caseload Profile Report*, Federal Court Management Statistics (2004) (national median for time from filing of notice of appeal to disposition of case is 10.5 months), *available at* http://www.uscourts.gov/cgi-bin/cmsa2004.pl (last visited March 30, 2007).

Thus, under appellant's interpretation, the Act would effectively immunize the employing office of any elected official who resigns or is not reelected from liability for acts committed in violation of the CAA during the legislator's last few years in Congress. A more self-defeating construction of the statute is difficult to imagine.

II. MEMBERS ARE NOT ENTITLED TO SPEECH OR DEBATE CLAUSE IMMUNITY FROM CAA CLAIMS.

The Employing Office's proposed construction of the Speech or Debate Clause is equally destructive of the CAA—and equally inappropriate The Employing Office argues that the Clause covers personnel decisions relating to employees "whose job duties are part of the due functioning of the legislative process." Br. 27. But that is not the proper standard under the Speech or Debate Clause; and, contrary to the Employing Office's argument, the Constitution does not

prevent Congress from holding itself to the same standards that it applies to private employers and the Executive Branch. Indeed, Congress took special care in designing the CAA to avoid implicating even the most robust elements of the speech and debate immunity. Any contrary interpretation of the Speech or Debate Clause would wrongly and unnecessarily eviscerate the CAA's noble purpose of improving the democratic function by ensuring that Members of Congress are not above their own laws.

A. The Speech Or Debate Clause Applies Only To "Legislative Acts" Of Members Or Their Aides.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST., ART. I, § 6, cl. 1. The Clause preserves the separation of powers by protecting members of the Legislative Branch from undue intimidation or harassment, including litigation, by the Executive Branch or a "hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 181 (1966). *Accord Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975).

Since the Founding, the Clause has been understood to apply only to acts that are themselves an integral part of the legislative process. *See* Thomas Jefferson, *A Manual of Parliamentary Practice* (1800), *reprinted in* THE COMPLETE JEFFERSON 704 (S. Padover ed. 1943) (the privilege "is restrained to things done in the House in a Parliamentary course"). Specifically, this Court has held that only a "legislative act"—"an act generally done in Congress in relation to the business before it"—is immune from judicial review. *United States v. Brewster*, 408 U.S. 501, 512 (1972); *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 863, at 630 (5th ed. 1891) ("[T]his privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things beyond the place and limits of duty.").

Interpreting this text, this Court has held that the Clause provides immunity for acts of voting, statements made during committee proceedings, issuance of congressional subpoenas, preparation of committee reports, and communications with other Members. *See, e.g.*, *Brewster*, 408 U.S. at 512; *Doe v. McMillan*, 412 U.S. 306, 311-12 (1973); *Eastland*, 421 U.S. at 505; *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). But the Court has emphasized that acts do not become "legislative in nature" merely because Members "generally perform [them] in their official capacity," *Gravel v. United States*, 408 U.S. 606, 625 (1972), and that the Clause "does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions." *Brewster*, 408 U.S. at 528. The Court has explained that:

> [l]egislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel, 408 U.S. at 625. Immunity is limited to acts "which [are] clearly a part of the legislative process." *Brewster*, 408 U.S. at 515-16.

This Court has also made it clear that, even when applicable to decisions or actions of Members or their aides, Speech or Debate Clause immunity does *not* run to other officials or entities in the Legislative Branch that are simply implementing or carrying out a Member's legislative act. *See, e.g.*, *Kilbourn*, 103 U.S. at 205 (execution of arrest warrant by Sergeant-at-Arms not protected from suit even though vote on resolution authorizing arrest was protected); *Powell*, 395 U.S. at 506 (Clerk and Doorkeeper implementing

protected resolution were not immune from suit); *cf. Dombrowski v. Eastland*, 387 U.S. 82, 84 (1967) (alleged conspiracy including committee counsel not protected even though Member was protected).

B. An Employing Office's Personnel Actions Are Not Legislative Acts Of A Member Or Aide.

1. The Covered Personnel Actions Are Not The "Legislative Acts" Of A "Member" Or Aide Within The Meaning Of The Speech Or Debate Clause.

Personnel actions concerning Legislative Branch employees are not "legislative acts" and thus are not immune from suit under the Speech or Debate Clause. To be sure, "[e]mployment decisions can be quite important in facilitating the legislative process, but they simply are not part of it. Just like the gathering of documents for use in a congressional hearing, which the [Supreme] Court has said is outside the scope of the constitutional immunity, even the most important personnel decisions are simply a means of preparing for the legislative process." Nelson Lund, *Congressional Self-Exemption from the Employment Discrimination Laws: A Rational Choice Analysis of the Civil Rights Act of 1991*, 54 LA. L. REV. 1559, 1577 (1994). Indeed, personnel decisions are even more remote from the legislative process than gathering documents, for such decisions do not occur in or during the session of a legislative body; they do not impact legislation; and, they do not impact the public for which the legislative process exists. They are, rather, merely part of the process of managing an office. The fact that the management decision is made by a Member is irrelevant; "[t]hat Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. 625.

Review of personnel actions would not implicate the primary purpose of the Speech or Debate Clause—the

protection of the Legislative Branch from intimidation or harassment by a coordinate branch. Review would not "threaten the integrity or independence of the [Congress]," *id.*, because personnel decisions are not part of the legislative process itself. For this reason, the numerous academics who have addressed this precise question under the CAA have concluded that the Speech or Debate Clause does not preclude claims for unlawful personnel actions involving congressional employees, including employees with legislative duties. *See, e.g.*, James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. LEGIS. 1, 55 (1999); Lund, *supra*, at 1577; Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 136-37 (1994).

In addition, the CAA was specifically designed to avoid the risk of intimidation by providing that the challengeable personnel actions are not even the actions of the "Member" or a personal aide. That is, the CAA does not create any claims against Members or their aides. The CAA allows claims to be filed only against an "employing office" for its distinct employment actions. Specifically, under the CAA, the "employing office" is the legal entity that employs the employees of a congressional office, that takes official responsibility for implementing personnel actions, and that may be sued. *See* 2 U.S.C. §§ 1301(9), 1405(a). And, any damages awarded or settlements paid are funded by an account of the Department of the Treasury, not by the individual Member or even by the congressional office that the Member runs. *See id.* § 1415(a). In short, neither Members nor their aides are viewed for these purposes as having implemented covered personnel actions or as being subject to suit.

This design was purposeful. The CAA created the "employing office" so that it could play this separate role and

avoid any Speech or Debate Clause questions whatsoever. *See* 141 Cong. Rec. S444 (daily ed. Jan. 5, 1995) (statement of Sen. Grassley); *id.* at S452 (statement of Sen. Lieberman). The Employing Office's contrary argument simply fails to recognize that "the CAA shields members themselves from litigation even while making Congress accountable as an institution." Brudney, *supra* at 10.

In sum, in light of the careful design of the CAA, there is no fair argument that the Speech or Debate Clause applies to claims under it. Speech or Debate Clause precedent clearly distinguishes between "legislative acts" of Members (or their aides) and separate acts by others. In *Powell*, for example, Members of the House illegally voted to exclude Powell, and House aides—the Clerk and the Doorkeeper—implemented the invalid resolutions. The Members were dismissed, but the case proceeded against the legislative agents who implemented the Members' decision. *See* 395 U.S. at 506. Similarly, in *Kilbourn*, the Members who voted for a congressional witness's arrest were protected from suit, but the Sergeant of Arms who executed the congressional order was liable for damages for the unlawful arrest. *See* 103 U.S. at 204-05. These cases "reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive [or judicial] control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." *Gravel*, 408 U.S. at 620. The CAA's careful design easily puts to rest any claim that recognition of such a privilege is necessary here. Not only are "legislative acts" not an issue, but the CAA makes a separate entity—not the Member or an aide—legally responsible for the actions that it covers, thus placing the CAA outside of the reach of the Speech or Debate Clause.

Because a decision is separate from its implementation under Speech or Debate Clause jurisprudence, appellant is wrong to suggest (Br. 43) that suing the employing office is

no different than suing the Member or a personal aide. As Judge Brown concluded in her concurring opinion below, "Congress intended to subject the *legislative branch* to liability for violation of federal employment laws, not to subject its members personally to such liability." Juris. Statement 49a (emphasis in original). "[T]he 'employing office' is nothing like a member's aide, who can invoke the Speech or Debate Clause privilege on the member's behalf." *Id.* at 50a. "Most accurately put, the 'employing office' is an administrative division within Congress, designated to be named as the defendant in these actions. Nothing in that status suggests that an employing office can invoke a member's Speech or Debate Clause rights." *Id.* at 51a.

2. All Available Interpretive Evidence Confirms This Construction Of The Speech Or Debate Clause.

All of the sources that this Court might consult to determine the scope of constitutional immunities confirm that the personnel actions of an "employing office" are not within the scope of the Speech or Debate Clause.

First, this Court's decisions interpreting other, analogous common law immunities make clear that administrative decisions like those at issue here are not the kinds of acts made immune by the Clause. This Court has repeatedly "equated" speech and debate immunity with common-law immunity (relying on precedent concerning one to interpret the other). *See Sup. Ct. of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 733 (1980); *see also Eastland*, 421 U.S. at 506-07; *Dombrowski*, 387 U.S. at 85; *Johnson*, 383 U.S. at 179-80. In the context of these common law immunities, it is well settled that employment actions are administrative acts *not* entitled to immunity.

In *Forrester v. White*, 484 U.S. 219 (1988), for example, this Court held that a judge's absolute immunity from suit for performance of judicial functions did not extend to a decision

to fire a probation officer, although the officer's duties were "inextricably tied to discretionary decisions that have consistently been considered judicial acts," *id.* at 222 (internal quotation marks omitted), and "essential to the very functioning of the courts." *Id.* at 228. This Court ruled that terminating the officer was neither a "[J]udicial [n]or adjudicative" act, and thus was not immunized. *Id.* at 229.

In so ruling, this Court emphasized that it was "the nature of the function performed, not the identity of the actor who performed it, that informed [its] immunity analysis." *Id.* Further, the Court held that its precedents revealed "an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform," *id.* at 227. Although the judge's acts "may have been quite important in providing the necessary conditions of a sound adjudicative system," they "were not themselves judicial or adjudicative" but administrative and were not immune. *Id.* at 229. *See also Gross v. Winter*, 876 F.2d 165, 172 (D.C. Cir. 1989) ("[T]he functions judges and legislators exercise in making personnel decisions affecting such employees are administrative, not judicial or legislative."). "[T]he import of [*Forrester*] extends beyond state-court judges and probation officers," because the "holding was informed by a common theme [that this Court] discerned in its immunity precedents," *id.* at 171 (citing *Forrester*, 484 U.S. at 228)—to wit, that the function that judges and legislators exercise in making personnel decisions affecting such employees is administrative, not judicial or legislative. *See also id.* at 172.

Second, *Forrester*'s holding that personnel actions are administrative in nature, and not properly subject to immunity, has been endorsed by the coordinate branches of government. In *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), the United States took the position that, "[i]n light of recent Supreme Court precedent [*Forrester*], we submit that personnel decisions are never protected by the

Speech or Debate Clause." *See* Br. of the United States at 16, *Rostenkowski* (Nos. 94-3158, 94-3160) (Jan. 23, 1995), *available at* 1995 WL 17204072.

In debates over the CAA, Congress built upon earlier constitutional deliberations and similarly concluded that Speech or Debate Clause immunity does not attach to congressional personnel actions. For example, Representative Goodling included in the record a 1991 Congressional Research Service Report, explaining that *Forrester* strongly suggested that the Speech or Debate Clause would not bar a suit because "hiring and firing practices are not legislative within the meaning of the clause." 141 Cong. Rec. H252-01, H265 (daily ed. Jan. 17, 1995). Senator Lieberman similarly noted that:

> an illegal employment action would not be regarded by the courts as an act that is "legislative in nature" . . . . [T]his is just common sense that the speech-and-debate clause on its face would not seem to be a clause that would make us immune from the impact of the laws we adopt and impose on all other employers when we are acting as employers instead of as Members of the Congress involved in legislation.

141 Cong. Rec. S693-02, S701-02 (daily ed. Jan. 10, 1995). *See also* 141 Cong. Rec. S621-02, S639-40 (daily ed. Jan. 9, 1995) (statement of Sen. Grassley) ("If Members heard during the previous speeches that *Browning* [*v. Clerk, U.S. House of Reps.*, 789 F.2d 923 (D.C. Cir. 1986)] may [a]ffect what we can do here on congressional coverage to protect our employees because they might be an extension of our legislative duties, under the speech and debate clause, you should observe that the Supreme Court, 2 years later, in 1988, issued an opinion [*Forrester*] that requires *Browning* to be revisited.").

Third, those courts of appeals that have considered the issue have uniformly concluded that the Speech or Debate Clause

does not apply. In *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004), *cert. denied*, 127 S. Ct. 975 (2007), the Tenth Circuit held that the Speech or Debate Clause does not bar an action under the CAA, noting that the Clause "should not be, and has not been, read to make members of Congress into a special class of citizens protected from suit (or prosecution) arising out of any activity that could assist in the performance of their official duties," *id.* at 1306-07, and that a "personnel decision is not a 'legislative act,' as defined by the Supreme Court." *Id.* at 1318. Similarly, in the decision below, the D.C. Circuit held that the personnel decisions at issue were not legislative acts subject to Speech or Debate immunity because liability was not predicated on an inquiry into "how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee" in order to make out a violation of the CAA. Juris. Statement 13a (internal quotation marks and citation omitted).

3. The Employing Office's Contrary Arguments Are Wrong.

In arguing for immunity, the Employing Office relies primarily on the test adopted in the D.C. Circuit's earlier, now repudiated, decision in *Browning* and, in particular, on the view that immunity applies where the *duties* of the employee (against whom the employer's action is taken) are part of the due functioning of the legislative process. *See* Br. 29 n.8 (characterizing its test as "a minor modification of the test articulated in *Browning*"). But, in determining the nature of a personnel action (as "judicial" or "administrative"), *Forrester* accords no weight to the employee's duties, even though as a practical matter, they may be essential to the functioning of the institution in question. *See Forrester*, 484 U.S. at 228. And this Court's speech and debate immunity jurisprudence makes clear that the pertinent inquiry is whether the action challenged is a "legislative act," not whether the employer's

action is taken with respect to an employee who performs legislative duties.

Indeed, the bizarre implication of appellant's view of the Speech or Debate Clause—an implication that the Employing Office itself identifies—demonstrates that its interpretation is untenable. The Employing Office admits that in its view, while unlawful termination claims *are* barred by the Speech or Debate Clause, CAA claims based on a hostile work environment are *not*. The Employing Office reasons that "[g]roping employees and telling lewd jokes are not legislative acts." Br. 31. Yet, on appellant's logic, *terminating* an employee for complaining about the groping or refusing to have sex with the Member *is* a legislative act. This logic is perplexing at best: just as soliciting sexual favors from an employee is not a legislative act, terminating the employee for refusing to grant the sexual favor is not a legislative act.

Equally indefensible is the implication of the Employing Office's view of speech and debate immunity on Hanson's claim for overtime pay in connection with his work on a "Health Care Help Line," which assisted people having difficulties with their insurance carriers or HMOs. Juris. Statement 7a. In the Employing Office's view (*see* Br. 40) the overtime claim is barred because Hanson had *some* job duties that were part of the due functioning of the legislative process. Paying overtime wages, however, cannot be understood as part of the legislative function, and here, even the underlying work with constituents giving rise to Hanson's particular overtime claim was unrelated to the legislative process. There is no authority supporting an interpretation of the Speech or Debate Clause that would bar this claim.

In addition, the Employing Office relies heavily and inaptly on *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In *Nixon*, this Court held that, due to "the special nature of the President's constitutional office and function[]," he has absolute immunity from common law liabilities for executive acts

performed within the "'outer perimeter' of his official responsibility." *Id.* at 756. The Court reasoned that the President has sole responsibility for the Executive Branch and that administration of the Executive Branch is "a task for which imperative reasons require an unrestricted power in the President to remove the most important of his subordinates in their most important duties." *Id.* at 750 (internal quotation marks and alternations omitted).

Relevant here, the Court in *Nixon* had no occasion to address whether and in what circumstances (if any) the President might have immunity from express statutory claims (like those the CAA creates). Moreover, the Court did not address the reach of the Speech or Debate Clause, which had been authoritatively limited to "legislative acts." *See also id.* at 762 (Burger, C.J., concurring). Furthermore, *Nixon* dealt with the unique institution of the presidency, with its responsibility for all administrative acts in the Executive Branch. The case thus neither calls into question the proposition that personnel actions are "administrative" acts nor determines whether the hundreds of members of Congress (in contrast to the single President) require immunity from statutory (as opposed to common law) liability for personnel actions in order to perform their distinct legislative functions. *Nixon* simply has no proper application to the question presented here.

Finally, the Employing Office contends (Br. 30-32) that allowing judicial review of claims for allegedly unlawful personnel actions would unduly interfere with the legislative process. This contention is unsound.

As this Court has explained, "even quite burdensome interactions" between the judiciary and another branch of government do not "necessarily rise to the level of constitutionally forbidden impairment of the [Branch's] ability to perform its constitutionally mandated functions." *Clinton v. Jones*, 520 U.S. 681, 702 (1997). Rather, judicial review unduly intrudes on another branch only when the court

"is being asked to perform any function" of the other branch. *Id.* at 701.

Given the design of the CAA, actions under it have no potential to usurp legislative authority. Under the CAA, Members remain free to perform legislative functions without judicial interference: they may vote on legislation, propose legislation, hold hearings, and participate in the legislative process. Indeed, a Member cannot be restrained from these functions by virtue of CAA litigation, because a Member *cannot be* a party to a CAA action. 2 U.S.C. §§ 1405(a), 1408(b). The CAA also guarantees that no Member will fear a large damage award, as the CAA prohibits awards of punitive damages, and all damages are paid by a Treasury account. *Id.* §§ 1361(c), 1415(a).

Appellant's specific contention (Br. 29) that the CAA permits undue interference by allowing reinstatement as a remedy for discrimination claims is erroneous. Of course, the potential reinstatement remedy is entirely speculative at this point; and its mere existence would not itself justify barring a suit entirely. In any event, appellant's contention rests on the false assumption that personnel decisions, particularly discriminatory ones, are part of the integral functioning of the legislative business of Congress. If this Court determines otherwise, reinstating a congressional employee, like firing the employee, will not amount to performing a legislative act. In addition, the fact that employees may be reinstated does not mean that a Member must retain those employees without regard to other factors. It does not violate the CAA to consider party affiliation, domicile or political compatibility with the employing office, qualifications, or performance when hiring and firing congressional employees. *See* 2 U.S.C. § 1432(a).

In addition, this Court's decision in *Forrester* answers the concern that "the threat of vexatious lawsuits by disgruntled ex-employees could interfere with the quality of a judge's decisions," 484 U.S. at 229. In *Forrester*, the Court declined

to act on this concern because "it in no way serves to distinguish judges from other public officials who hire and fire subordinates." *Id.* at 229-30. The Court explained:

> Absolute immunity. . . is "strong medicine, justified only when the danger of [officials being] deflect[ed from the effective performance of their duties] is very great." The danger here is not great enough.

Id. at 230 (alterations in original) (citation omitted). The same is surely true with respect to CAA claims asserted against an employing office.

Finally, the Employing Office's argument concerning undue interference ignores Congress's judgment that "Congress will write better laws when it has to live by the same laws it imposes on the private sector and the executive branch." 141 Cong. Rec. H90-02, H94 (daily ed. Jan. 4, 1995) (statement of Rep. Shays); *see also* 141 Cong. Rec. S452 (daily ed. Jan. 5, 1995) (statement of Sen. Lieberman). On this point, the constitutional framers agreed. Thomas Jefferson opined, for example, that the Speech or Debate Clause was worded narrowly so that Congress could be held to its own laws:

> It was probably from [their] view of the encroaching character of privilege, that the framers of our Constitution, in their care to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation, have only privileged 'Senators and Representatives' themselves from . . . being questioned in any other place for any speech or debate in either House.

Jefferson, *supra*, at 702. And, James Madison concurred. *See* THE FEDERALIST No. 57, at 352 (James Madison) (Clinton Rossiter ed. 1961) ("[T]hey can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society."). The

Employing Office's contrary, self-serving argument flies in the face of this history.

C. Contrary To The Employing Office's Alternative Argument, The Speech Or Debate Clause Does Not Prohibit Inquiry Into Hiring And Firing Decisions.

Seeking to build upon the unsound *dicta* in Judge Randolph's plurality opinion below, the Employing Office argues in the alternative (Br. 32) that the Speech or Debate Clause "preclude[s] *adjudication* of a CAA case if the challenged personnel action was related to an employee's performance of those job duties that are legislative acts." (emphasis added). Specifically, like Judge Randolph, the Employing Office argues that in CAA suits a Member must "submit an affidavit" describing the legislative functions the former employee performed poorly, *id.* at 33, and like Judge Randolph, concludes that the potential for such testimony requires dismissal of this suit. It was inappropriate for Judge Randolph to address this argument, as no testimonial privilege has been raised or could be raised at this point in the litigation. *See* Juris. Statement 29a (Rogers, J., concurring) ("Because these are appeals of denials of motions to dismiss under Federal Rule of Civil Procedure 12(b)(1), the court need not address what happens when legislative acts are evidence in varying contexts in CAA litigation."); *United States v. Myers*, 635 F.2d 932, 942 (2d Cir. 1980) ("[w]hether the appellant will choose to offer evidence of his own legislative acts is, at this point, a matter of speculation"). In all events, the Employing Office's argument, and the *dicta* below, is erroneous.

This Court's cases establish not only an absolute immunity from suit under the Speech or Debate Clause but also a testimonial privilege that "protect[s] Members from inquiry into legislative acts or the motivation for actual performance of legislative acts." *Brewster*, 408 U.S. at 509. Thus, in *Johnson*, 383 U.S. 169, the Court held that, where the

underlying act alleged to be unlawful is *itself* a legislative act, the Clause prohibits evidence about the legislative act or a Member's involuntary compulsion to testify about legislative acts. *Id.* at 184-85. But, the Court has made clear that "a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." *Brewster*, 408 U.S. at 512.

These precedents mean that "members of Congress are privileged against the evidentiary use against them of any legislative act." *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 n.5 (D.C. Cir. 1995). But, the precedents do not prohibit lawsuits simply where there is a possibility that a Member may decide to offer evidence of legislative acts as part of a defense, particularly where the suit is not based on the unlawfulness of a legislative act. As the Second Circuit has explained,

> The protection against being "questioned" outside of Congress prevents the use of legislative acts against a Member. It does not prevent him from offering such acts in his own defense, even though he thereby subjects himself to cross-examination.

Myers, 635 F.2d at 942.

Thus, as now-Justice Alito explained in an opinion for the Third Circuit, the testimonial privilege of the Speech or Debate Clause merely prohibits "*for[cing]* [a Member] to refute charges that directly implicate legitimate legislative acts." *United States v. McDade*, 28 F.3d 283, 294, 295 n.14 (3d Cir. 1994) (emphasis in original). It does not prohibit a Member from "choos[ing] to offer rebuttal evidence of legislative acts." *Id. See also Rostenkowski*, 59 F.3d at 1303 ("[W]e agree with the Second and Third Circuits that the constitutional protection against his being questioned for his legislative acts does not prevent a Member of Congress from offering such acts in his own defense, even though he thereby

subjects himself to cross-examination.") (internal quotation marks and citation omitted).

In light of the limited scope of the testimonial privilege, both Judge Randolph and the Employing Office are wrong to suggest that the testimonial privilege is implicated here. Questioning a Member about his or her explanation for terminating or disciplining an employee—*i.e.*, questioning the Member about whether and how the employee did a poor job of executing job duties related to legislative acts—simply is not the same thing as questioning a Member about those legislative acts. The questioning does not require a Member to answer for or about a legislative act. It simply elicits information about a personnel action—an administrative act. In addition, if the Member chooses to raise legislative acts as a defense, that would not operate to bar testimony about the acts. To be sure, the Speech or Debate Clause prevents those outside of Congress from using legislative acts against a Member or forcing a Member to testify *involuntarily* about legislative acts, but it does not prevent the Member from offering such acts as part of his or her defense *even though the Member thereby subjects himself to cross-examination.*

In all events, assertion of a testimonial privilege would not require dismissal of this suit. The testimonial component of the Speech or Debate Clause is an *evidentiary* privilege that permits Members to refuse to answer certain questions and bars the introduction of evidence of a legislative act where it is being used to demonstrate the unlawfulness of the act. 26A CHARLES A. WRIGHT *et al.*, FED. PRAC. & PROC. EVIDENCE § 5675 (1992); RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW § 8.8 (7th ed. 2004). But this Court has never suggested that the baby must be thrown out with the bath water. Rather, it has recognized that the testimonial privilege can be preserved without barring an entire suit about a non-legislative, personnel action. *See Johnson*, 383 U.S. at 172, 177 (holding that even though Member of Congress was not immune from suit, he could

assert privilege and refuse to answer specific questions); *see also Brewster*, 408 U.S. at 528 (observing that *Johnson* held certain evidence inadmissible but allowed conviction if "no showing of legislative act is required").

D. Any Doubt Should Be Resolved By The Strong Presumption That The CAA Is Constitutional.

Any doubt about the proper application of the Speech or Debate Clause—as to either its immunity or testimonial privilege—should be resolved against the Employing Office. The Employing Office seeks to use the Speech or Debate Clause to have the CAA held unconstitutional as applied. But the CAA, like all federal statutes, is entitled to a strong presumption of constitutionality. *See Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("Congress is a coequal branch of government whose Members take the same oath [judges] do to uphold the Constitution."). Moreover, where Congress has specifically considered the question of a statute's constitutionality, "[t]he rational and practical force of the presumption [that a law is constitutional] is at its maximum." *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953). That is the case here.

Time and again—in connection with the Civil Rights Act of 1991, 2 U.S.C. §§ 601 *et seq.*, the Report of the bipartisan Joint Committee on the Organization of Congress, a congressional accountability bill introduced in the 103rd Congress, and the enactment of the CAA—Congress has expressed its view that the Speech or Debate Clause does not prevent regulation of congressional employment actions.[3]

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[3] *See* 136 Cong. Rec. S9339-02, S9372 (daily ed. July 10, 1990) (rejecting point of order concerning constitutionality of judicial review of Senate employment decisions); H.R. Rep. No. 103-413, at 133-34 (1993) (observing that *Forrester* strongly suggests that Members have no immunity for employment decisions, and the D.C. Circuit should reconsider its contrary case law); 140 Cong. Rec. H7339 (daily ed. Aug. 10, 1994) (statement of Rep. Swett) (CAA addressed all constitutional

That considered judgment by a coordinate branch may be displaced only by an unambiguous constitutional command that is not present here.

This presumption of constitutionality is uniquely appropriate here. Speech or Debate Clause protection is typically invoked when a member of the public or an Executive Branch prosecutor seeks to hale a legislator into court. In the context of the CAA, however, Congress is policing itself, and the Constitution confers broad discretion on each House to determine its own rules of conduct for Members. *See* U.S. CONST. ART. I, § 5. To apply Speech or Debate Clause immunity to CAA claims would be to wrongly "force upon Congress an immunity that Congress itself does not believe is needed to protect its own independence." Lund, *supra*, at 1583. It would prevent Congress from imposing on itself the laws that it has imposed on the Executive Branch and the public at large. Nothing in the text or history of the Speech or Debate Clause supports such an unnatural effort, as the Framers themselves argued that Congress *should* be subject to its own laws and that the Speech or Debate Clause would not operate to prevent it. *See supra* pp. 13-14.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be affirmed.

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concerns); *id.* at H7344 (statement of Rep. Rose) (CAA did not run afoul of Constitution); *id.* at H7351 (statement of Rep. Sanders) (same); H.R. Rep. No. 103-650, at 1, 3 (1994) (same).

Respectfully submitted,

VIRGINIA A. SEITZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

GLEN D. NAGER
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

TRACI L. LOVITT
Counsel of Record
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Amici Curiae

April 2007

No. 06-618

In The Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

vs.

BRAD HANSON,

Appellee.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* PRESIDENT *PRO TEMPORE* OF THE SENATE OF PENNSYLVANIA, SUPPORTING APPELLANT

JOHN P. KRILL, JR.
(Counsel of Record)
LINDA J. SHOREY
GEORGE A. BIBIKOS
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
17 N. Second St., 18th Floor
Harrisburg, PA 17101
(717) 231-4500
Counsel for Amicus Curiae

March 5, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

The legislative branch of Pennsylvania government is the General Assembly, which consists of a House and Senate. *Amicus Curiae* is the President *pro tempore* of the Senate ("President *pro tempore*").[2]

Within each of the two chambers there are two caucuses that are responsible for their own and their members' operations. For institutional operations, fiscal and personnel matters are handled, in the Senate, by the Chief Clerk under the direction of the President *pro tempore*. The caucuses' institutional duties include the administration of employment and personnel programs. These are handled largely through legislative management committees.[3] Each caucus hires legislative assistants and assigns

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the office of the *amicus* made a monetary contribution to the preparation of this brief. The parties consented to the filing of this brief, and copies of the parties' consents are on file with the Clerk of Court.

[2] The current President *pro tempore* is Senator Joseph B. Scarnati, III, who is a member of the Republican Caucus, which is currently the Majority Caucus.

[3] Section 2.2 of the Act of January 10, 1968, P.L. (1967) 925, *as amended*, 46 P.S. §42.102d, provides:

> The Majority and Minority Caucuses shall each establish a Legislative Management Committee which shall be composed of the Floor Leader who shall be chairman and so many additional caucus members as may be determined by each caucus. For the Majority Caucus, the President pro tempore, and for the Minority Caucus, the Minority Leader, shall each select a staff administrator who shall administer the fiscal and personnel matters of the caucus in conjunction with the Chief Clerk and perform such other duties as may be assigned.

them to positions in the capitol and in the district offices of individual senators throughout the Commonwealth.

Legislative assistants perform a variety of functions that are integral to the legislative process.[4] For example, legislative assistants are often involved in research that provides the basis for drafting bills. They are often also involved in the drafting of bills that will be sponsored by a member to whose office or caucus they are assigned. They will often draft amendments to bills sponsored by either that member or other members.

An important legislatively related duty is contact with constituents. Legislative assistants in district offices are often the initial, and sometimes the principal, point of contact between constituents and legislators. Legislative assistants listen to the concerns of citizens and pass them on to legislators. Legislative assistants also often inform constituents of legislators' positions on pending bills and convey the reaction of the constituency back to the representatives.

The only legislative functions that legislative assistants do not perform are the actual sponsoring, debating, and voting on measures that come before committees or to the floor of the Senate. Even debates and votes, though, are facilitated by the preparations and communications of

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[4] The term "legislative assistant" is not used here as a job title, but as a reference to any employee, regardless of title, who provides legislative support services to elected lawmakers, either individually or as a group. For example, it would include the parliamentarian, chief clerk, drafting attorneys, fiscal analysts, research assistants, legislative committee directors and counsel to a legislative committee, as well as staff in a legislator's district office who handle constituent communications.

legislative assistants that precede those formal actions, including informal negotiation with other legislative offices, state officials, or interested parties. A modern state legislature could not function without the help of such employees.

Because of the involvement of legislative assistants in public policy and constituent communication on behalf of legislators, it is essential that they enjoy the complete confidence of the legislators whom they serve. Moreover, their public conduct and their politics reflect on the legislators who employ them. They are the *alter egos* of the elected representatives.

From time to time, the employment of a legislative assistant is terminated, usually at the request of or with the concurrence of the legislator to whom the employee was assigned. However, the nature of the work of legislative assistants in public policy issues creates an enhanced opportunity for the former employee to claim, regardless of the actual grounds for termination, that the real reason was retaliation for the employee's exercise of First Amendment rights of political speech or political association. Claims of discrimination of one type or another are also not uncommon. A civil rights action in federal court can sometimes ensue.

Until now, such suits in federal court by terminated legislative assistants have been defendable by the assertion of legislative immunity, which for state legislators is

coterminous with the "Speech or Debate" immunity of their congressional counterparts.[5]

In the instant case,[6] the United States Court of Appeals for the District of Columbia Circuit held that the immunity conferred by the Speech or Debate Clause of the United States Constitution did not apply to personnel decisions of members of Congress or their congressional offices. The D.C. Circuit overruled its decision in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), that the Speech or Debate Clause protects employment decisions concerning any employee whose job duties are "directly related to the due functioning of the legislative process." 789 F.2d at 929.

The Majority opinion for the D.C. Circuit looked at the legislative process with a very narrow field of vision that excludes what in real life is the greater part of the process. The court held that the "integral" parts of the process only include making a speech, engaging in debate, proposing

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[5] The Speech or Debate Clause of the United States Constitution, U.S. CONST. art. I, §6, cl. 1, does not apply *per se* to state legislators sued in federal court. Similar provisions in state constitutions, e.g., PA. CONST. art. II, §15, cannot shield a state official from a federal cause of action. Nevertheless, state legislators have "common-law immunity from liability for their legislative acts . . . that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 732 (1980). Thus, when legislative immunity applies, state legislators are as immune from suit in federal court as their federal counterparts. *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951). Accordingly, the standards for determining legislative immunity will be the same regardless if the defendant is a member of Congress or a state legislator.

[6] Reported *sub nom. Fields v. Office of Eddie Bernice Johnson* and *Hanson v. Office of Senator Mark Dayton*, 459 F.3d 1 (D.C. Cir. 2006).

and voting on legislation, preparing and using legislative reports, authorizing investigations, and holding hearings. The court's list is akin to an elementary primer in how a bill becomes law, but overlooks the behind-the-scenes role of staff work and constituent communications. In overruling *Browning*, the D.C. Circuit rejected the notion that legislative immunity protects "personnel decisions" as it previously held in *Browning*, regardless of the duties of the employee discharged. The Majority opined that personnel decisions lack a nexus to the kinds of legislative activities it identified. Recognizing that Speech or Debate immunity would play some role in the case on remand, the D.C. Circuit offered various thoughts, in *dicta* in the majority and concurring opinions, on how immunity could affect a plaintiff's ability to prove a case.

The D.C. Circuit's decision has the collateral effect of practically obliterating legislative immunity for state legislators' personnel decisions affecting legislative assistants. Indeed, the United States Court of Appeals for the Third Circuit in *Fowler-Nash v. Democratic Caucus*, 469 F.3d 328 (3d Cir. 2006), relying in part on the D.C. Circuit's decision, recently concluded that neither state legislators nor their caucuses have legislative immunity from suit in federal court for personnel decisions affecting legislative assistants.

The D.C. Circuit's decision creates a dilemma for every legislator. One must hire legislative assistants, because they are essential to the legislative process. Yet, once hired, they cannot be fired without subjecting legislators to the potentially heavy burden of defending a lawsuit. Immunity was supposed to relieve them of that burden. The D.C. Circuit's speculation about a residual immunity for evidentiary purposes does not relieve them

of the burden of defense. On the contrary, the abrogation of immunity as a bar to claims may well put pressure on legislators to waive immunity for evidentiary purposes, in order to counter the plaintiff's case.

Amicus curiae believes that treating legislative personnel decisions as unrelated to the legislative process is an artificial and unrealistic dichotomy. *Amicus curiae* therefore submits this brief in support of the Office of Senator Mark Dayton.

SUMMARY OF ARGUMENT

Legislative immunity applies to personnel decisions regarding legislative assistants, because of the integral role they play in the legislative process. Their duties directly affect the legislative process. In evaluating any immunity question regarding the discharge of legislative assistants, their job duties must be taken into consideration. The D.C. Circuit abandoned its decision in *Browning* which concluded, rightly, that legislative employers should have immunity from suit for personnel decisions impacting integral legislative employees that affect the legislative process. By abandoning *Browning* and its reasoned approach to legislative immunity from suit for legislative personnel decisions, the D.C. Circuit increased judicial involvement in legislative affairs. This Court should clarify that its decision in *Forrester v. White*, which has been invoked by courts of appeal to deny legislative immunity for personnel decisions, is not a blanket rule that applies in every circumstance where governmental immunity is claimed but is, instead, a case which implicitly recognizes

the distinctions between the nature of judicial and executive functions.

ARGUMENT

I. LEGISLATIVE IMMUNITY APPLIES TO PERSONNEL DECISIONS.

Legislative immunity extends beyond mere "speech" or "debate" on the house floor. *See Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881) ("It would be a narrow view of the constitutional provision to limit it to words spoken in debate."). This immunity has constitutional moorings and is designed to protect legislators and legislatures from defending lawsuits so they may carry out their lawmaking functions. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975) (protecting legislators "'not only from the consequences of litigation's results but also from the burden of defending themselves.'") (internal citations omitted).

Litigation that results from the allegations of former assistants or aides of legislators, no less than any other type of lawsuit, distracts legislators and the institution itself from their function of lawmaking. *Gravel v. United States*, 408 U.S. 606, 625 (1972); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty[.] . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.").

Legislative immunity serves an important institutional function of preventing unwarranted judicial intrusion into the day-to-day affairs of the legislature. *United States v. Johnson*, 383 U.S. 169 (1966) ("The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature."); Thomas Jefferson (and James Madison), *Protest to the Virginia House of Delegates* (1797), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 336 (Philip B. Kurland & Ralph Lerner eds. 1987) ("[F]or the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other . . . is to put the legislative department under the feet of the Judiciary. . . .").

Thus, regardless of motive, activities that fall within the "legitimate legislative sphere" cannot be questioned in the courts. *Eastland*, 421 U.S. at 503 ("We reaffirm that once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference."); *see Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (the legitimate legislative sphere is determined "stripped of all considerations of intent and motive").

Personnel decisions affecting certain critical legislative employees fall within the "legitimate legislative sphere." As this Court has noted, a necessary element of legislative activity is the employment of staff to assist legislators in their work. *Gravel*, 408 U.S. at 625 ("[I]t is literally impossible . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants; . . . the day-to-day work of such aides is so

critical to the Members' performance that they must be treated as the latter's alter egos[.]"). Indeed, certain employees are so necessary to the function of legislatures that they are, in effect, the "alter ego" of the legislators whom they serve and are even entitled to the very immunity that clothes their legislative employer. *Gravel*, 408 U.S. at 625; *See Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (*per curiam*) (expanding legislative immunity to cover officers/employees of legislative bodies).

The application of legislative immunity to personnel decisions must therefore be evaluated by focusing on the duties of the legislative employee and the impact those duties have on the legislative process or the legislature itself. *Gravel*, 408 U.S. at 625 (immunity conferred by the Speech or Debate Clause extends to legislative assistants whose employment activities are integral to the legislative process); *Davis v. Passman*, 442 U.S. 228, 254 (1979) (Powell, J., dissenting) ("Whether or not the employment decisions of a Member of Congress falls within the scope of the Speech or Debate Clause of the Constitution, a question the Court does not reach today, *it is clear that these decisions are bound up with the conduct of his duties.*") (emphasis added). The D.C. Circuit in this case overruled its decision in *Browning* and declined to evaluate the duties of legislative assistants in determining whether personnel decisions affecting those employees fall within the legitimate legislative sphere of activities that should not be questioned by the courts.

By definition, "legislative assistants" assist legislators to carry out their legislative function. Legislative assistants often speak on behalf of the legislators whom they serve and represent to the public the position of their legislators. Similarly, many legislative assistants research

the law, track legislation, and even assist in drafting bills. Because legislative assistants research and track legislation, they are in a prime position to, and often do, discuss with their legislator his or her position on matters pending in the House or Senate and advise their legislator on how to vote on pending legislation. *See, e.g.*, Note, *The Speech or Debate Clause Protection of Congressional Aides*, 91 YALE L.J. 961, 969-70 (1982) ("By any measure, the workload of Congress has expanded enormously in the last several decades. Staff sizes have been enlarged dramatically to keep pace. Congressional aides now play vital roles in almost every aspect of the legislative process, from drafting bills and speeches to conducting investigations.").

Legislative assistants play a necessary role in the communicative and representative aspect that directly impacts legislation. Legislative assistants are, in effect, the front line of the information-gathering process. Legislative employers rely upon and need this information in order to represent their legislative districts adequately. Legislative assistants take information that they receive from the constituency (regarding anything from pending or desired legislation to constituent complaints or concerns) and relay that information back to the legislators for whom they work. *See, e.g.*, *Hobler v. Brueher*, 325 F.3d 1145, 1152 (9th Cir. 2002) ("Without a confidential secretary the official can trust to carry out his views, funnel communications in and out according to his priorities, and represent him in a way that enhances rather than damages his reputation, an elected official cannot effectively perform his office.").

Legislators formulate public policy with the input or assistance from their legislative assistants. This is the essence of legislating in a representative democracy:

> Legislators regularly use staff to gather information on controversial or sensitive subjects so that they can identify the magnitude of a problem and decide whether it is susceptible to a legislative solution. Hearings and subpoena authority are important means to this end, but preliminary and less formal methods of information gathering are often needed as well if Congress is to develop and maintain an adequate knowledge base. Similarly, members and their staffs frequently contact executive agencies as part of an effort to assess the burdens of compliance with a given statute or the extent of noncompliance with that law. While the contacts may be triggered by constituent requests or protests, the resulting assessment may well produce an amendment to the existing legislative scheme. Finally, disseminating information to the public can be a central part of members' attempts to generate broad support on a pending legislative matter. In an era when public opinion survey results help set the priorities for Congress's legislative agenda, members may seek to influence scheduling determinations through aggressive efforts to elevate public awareness of their issues.
>
> Each of these activities – gathering information, contacting agencies, and publicizing positions – is part of the business of legislating.[7]

James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. ON LEGIS. 1, 44 (1999).

[7] The same is true for state legislators.

In essence, legislative assistants collect the information that forms their legislator's basis for voting and policy development. Brudney, *supra*, at 64-65 ("Legislators are elected at least in part because voters perceive that they share various communities of interest with some or all of the legislator's constituents."). Without legislative assistants contacting constituents, fielding communications from constituents, and meeting with constituents (and even persons and groups outside their constituency), legislators would be legislating in a vacuum and representing their constituents without input from the public they represent. *Cf. Faughender v. City of North Olmstead, Ohio*, 927 F.2d 909, 914 (6th Cir. 1991) ("As political action cannot occur without communication, a position that controls the lines of communication of a political actor must be inherently political.").

The nature of legislative assistants' duties furthermore places them in a position of confidence with their legislative employers, who must rely to a significant degree on their staff in order to carry out their legislative and representative functions. *See, e.g., Davis v. Passman*, 442 U.S. 228, 254 (1979) (Powell, J., dissenting) ("Because of the nature of his office, [a legislator] must rely to an extraordinary extent on the loyalty and compatibility of everyone who works for him. . . . A Congressman simply cannot perform his constitutional duties effectively, or serve his constituents properly, unless he is supported by a staff in which he has total confidence."). As then Chief Justice Burger aptly noted in his dissenting opinion in *Davis*:

> Historically, staffs of Members have been considered so intimately a part of the policymaking and political process that they are not subject to

> being selected, compensated, or tenured as others who serve the Government. The vulnerability of employment on congressional staffs derives not only from the hazards of elections but also from the imperative need for loyalty, confidentiality, and political compatibility – not simply to a political party, an institution, or an administration, but to the individual Member.

Davis, 442 U.S. 249-50 (Burger, J., dissenting).

As state government grows in complexity, so do the duties of legislators. Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 226-27 (2003) ("The increased professionalization of state legislatures, combined with the growing complexity of issues facing them and the devolution of authority from the federal government to the states, are propelling more issues of state legislative privilege into the courts.").

As the duties of legislators increase, they must necessarily rely on legislative assistants to assist in carrying out legislative functions and should therefore be immune from suit for decisions affecting those employees. *See* Joint Committee on Congressional Operations on the Legislative Role of Congress in Gathering and Disclosing Information, The Constitutional Immunity of Members of Congress, S. Rep. No. 896, 93d Cong., 2d Sess. 47, 53 (1974) (Speech or Debate Clause immunity should include "any activities undertaken within the legislative branch in fulfilling the role of the Congress in the constitutionally defined government of coordinate and coequal branches.").

Because of the important role legislative assistants play in the legislative process, they are confidential

employees of policymakers. Persons who are confidential or policy-related employees can be discharged even for exercising what would otherwise be rights protected under the First Amendment. *See Garcetti v. Ceballos*, __ U.S. __, 126 S. Ct. 1951, (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); *Elrod v. Burns*, 427 U.S. 347 (1976).

Invariably, legislative assistants (like other confidential employees) (1) have access to a policymaker's confidential information and (2) are involved in the policymaker's channels of communication. *See, e.g., Faughender v. City of North Olmstead, Ohio*, 927 F.2d 909, 913-14 (6th Cir. 1991) ("Viewed in its functional aspect, a mayor's secretary is clearly the type of position that involves access to confidential and political material, and political loyalty, whether partisan or personal, is an essential attribute of the job."); *Hobler v. Brueher*, 325 F.3d 1145, 1155 (9th Cir. 2002) ("Without a confidential secretary the official can trust to carry out his views, funnel communications in and out according to his priorities, and represent him in a way that enhances rather than damages his reputation, an elected official cannot effectively perform his office."); *Weisel v. Hooks*, 277 N.J. Super. 78, 648 A.2d 1166, 1170 (1994) ("By assuming a position of confidence such as the secretary to a high-level cabinet officer, an individual assumes a degree of knowledge and access which limits his or her ability to associate freely and without restriction even though such conduct might otherwise be protected by the Federal or State Constitutions.").

The close, confidential nature of the relationship between legislator and legislative assistant assures legislators that they can openly discuss and debate even the most sensitive issues of policy and have input from their close advisors on these matters. Huefner, *supra*, at 285-86 ("[R]oom remains to recognize the value of behind-the-scenes negotiation, confidential advice from aides, and other internal aspects of the deliberative process that deserve to be 'as free from bias or pressure as possible.'").

It is therefore incongruous to recognize the indispensability of legislative assistants to the legislative process and, then, to refuse to consider the nature of their jobs in an employment termination lawsuit when legislative immunity is raised. It is likewise unrealistic to assume that a legislator formulates public policy single-handedly, without the input or assistance from his or her legislative assistants. A legislator relies on his or her legislative assistant as surely as a judge relies on his or her law clerk to research the law, draft opinions, and participate in the judicial decision making process.

By necessity, the decision to hire or discharge legislative assistants directly impacts the legislative process from the initial fact-gathering process to final enactment of a bill and all points in between. Personnel decisions affecting those employees fall within the legitimate legislative sphere that legislative immunity shields from questioning.

II. THE D.C. CIRCUIT'S DECISION INCREASES JUDICIAL INVOLVEMENT IN LEGISLATIVE AFFAIRS.

The decision in this case affords the judiciary a role in what should be purely legislative matters. If this Court affirms it, state legislatures can anticipate an increase in employment law claims, more complicated lawsuits to defend those claims, and more litigation involving discovery disputes. In turn, the judiciary's role in legislative employment matters increases. So long as a plaintiff alleges termination for any "improper" reason (one that does not involve what the D.C. Circuit has defined as a "legislative" act), the cause of action survives. As a result, federal courts may become the "human resources department" of state legislatures and the Congress.

Legislative immunity is no longer absolute if this decision stands. The circuit court wrongly assumed that *Browning* was "overinclusive" because it extended immunity to personnel actions that were motivated by factors other than performance of the employee directly on legislative matters. *Fields*, 459 F.3d at 11. The circuit court lost sight of the fact that the nature of immunity is to be overinclusive. It protects the holder of the privilege, right or wrong, from suit. Legislative immunity is not for the benefit of the individual legislator but for the public to whom legislators owe a duty of uninterrupted public service without the distractions of lawsuits contrived by disgruntled employees. *Coffin v. Coffin*, 4 Mass. 1, 27 (1808) ("These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil

or criminal."); Huefner, *supra*, at 227 ("In addition, society's increasing propensity to litigate and contemporary distrust of government almost guarantee that disaffected individuals – and even some political opportunists – will seek creative ways to gain relief through, extract information from, or merely harass or burden, elected state representatives.").

The D.C. Circuit's approach, in effect, strips immunity from legislators when they are deemed to have been in the wrong, vesting them with "immunity" only when they can prove that they were in the right. This is not immunity at all. It is merely a chance for non-liability, which, moreover, the legislator would have the burden of proving if the court's decision is upheld.

The D.C. Circuit's decision invites judicial inquiry into legislative motives. Legislative immunity, as properly conceived in *Browning*, avoided all inquiry into a legislator's motives. *See Tenney*, 341 U.S. at 377 ("The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned"). In contrast, the circuit court's decision in this case will precipitate discovery battles in which the compulsory process of the courts will be used to probe into legislators' motives to try to distinguish directly legislative from non-legislative motives, the actual from the pretextual, and the seemly from the unseemly. In many cases, if *Fields* is upheld, the courts will likely end up confronting legislators with the choice of losing a lawsuit or, by testifying, shedding even the remaining rags of immunity with which they are clothed.

The D.C. Circuit's decision also precipitates increased litigation involving legislators. If upheld, legislative

defendants will bear the burden of defending themselves for every employment action taken, regardless of the employee's duties in the legislative process. Virtually any disagreement with the legislator over policy or other "political" choices, if followed by a termination of employment, could result in a federal cause of action under 42 U.S.C. §1983 simply if the legislative assistant claims in a pleading that he or she was discharged allegedly in violation of the right to engage in political speech or to political affiliation under the First Amendment.

Finally, the D.C. Circuit's decision increases the risk of waiving privileged information about the legislative process. If legislative immunity is merely an evidentiary privilege, as the court seems to suggest, the legislative defendant has a burden to produce evidence that the employment action involved an integral component of the legislative process. If the legislative defendant discloses too little information (in a court's judgment), immunity does not attach. If the legislator discloses too much, the privilege may be waived.

III. LEGISLATIVE IMMUNITY DIFFERS FROM OTHER TYPES OF IMMUNITY.

Like other circuit courts of appeal, including the Third Circuit recently in *Fowler-Nash*, the D.C. Circuit was swayed at least in part by this Court's decision in *Forrester v. White*, 489 U.S. 219 (1988).[8] *See Fields*, 459 F.3d at 12-13 ("Later decisions cast doubt on *Browning*. Two years

[8] *Fowler-Nash* relied almost exclusively on *Forrester* to conclude that the act of terminating an employee is *per se* an administrative act not shielded by immunity. *Fowler-Nash*, 469 F.3d at 337.

after *Browning*, the Supreme Court ruled that a state-court judge did not have "absolute immunity from a suit for damages under 42 U.S.C. § 1983 for his decision to dismiss a subordinate court employee.")

Forrester employed a "functional" approach to questions of immunity, other than the immunity conferred by constitutional provision or statute,[9] to determine whether an Illinois judge who demoted and later fired a probation officer was entitled to judicial immunity. *Id.* at 224 ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, *we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted*, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.") (emphasis added).

The judge claiming judicial immunity in *Forrester* had two "functions" – an executive branch function (as supervisor of probation officers) and a judicial branch function. Under Illinois law, adult and juvenile probation officers were to be hired and fired by the chief judge (or another judge designated by the chief judge) of the circuit courts. The Court concluded that the judge's decision to fire the

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[9] The Court's functional approach ostensibly applies only to types of immunity "*other than* those that have been decided by express constitutional or statutory enactment. . . . This Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U.S. Const., Art. I, § 6, cl. 1." *Forrester*, 484 U.S. at 224, 230-31.

probation officer was not a "judicial act" for which he had judicial immunity.

The probation officer in *Forrester* was employed by the state circuit court not because of inherently judicial functions of the job, but because of an idiosyncrasy of Illinois law.[10] Probation officers perform inherently executive functions in supervising the conduct of persons convicted of crime. Their functions can also be prosecutorial, when the conditions of probation are violated. Their reports and testimony have weight as evidence in probation hearings. However, providing evidence to a court is not an adjudicative function; it is inherently adversarial. Finally, probation officers can have police powers, including the power of arrest.[11] For these reasons, probation officers can be categorized as functioning in an executive-branch capacity.

This Court's functional analysis was necessitated by the fact that a judge was carrying out the executive function of discharging an executive-branch-type employee (a probation officer). *Forrester* did not disturb the functional analysis of immunity questions that otherwise runs

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[10] Probation officers in other states are either employed by executive branch officers or by the courts. For example, Massachusetts probation officers are appointed by the Commissioner of Probation. MASS. GEN. LAWS ANN. ch. 276, §83. In Pennsylvania, some probation and parole officers are employed by the Courts of Common Pleas (generally handling cases where the sentence is less than two years), while others work for the state Board of Probation and Parole (an executive agency that, generally, handles longer sentences). *See* 61 P.S. §314 and 61 P.S. §331.2 *et seq.*

[11] E.g., in Pennsylvania, both state and county probation and parole officers are "peace officers" who have police power and authority to arrest "without warrant, writ, rule or process" any probationer or parolee. *See* 61 P.S. §309.1 and §331.27.

through the case law. Instead, *Forrester's* functional analysis showed simply that the judge's action was no different than that for which executive branch officials might be sued. *See id.* at 229-30. Although *Forrester* did not parse the detailed job description of probation officers, the case recognizes the distinctions between the nature of judicial and executive functions.

If the judge in *Forrester* had, on the same day, fired a law clerk as well as the probation officer, the functional analysis would lead to the conclusion that the judge would have judicial immunity against a suit by the former, but no judicial immunity (although perhaps a qualified executive immunity) against a suit by the latter. The judge would have immunity from a suit by the law clerk, because the clerk's job is an integral part of the judicial function of the court. The judge would be immune regardless of any alleged motive for the law clerk's firing (e.g., if the clerk were fired for exercising freedom of speech to criticize the reasoning of the judge's opinions). The judge is entitled to have absolute confidence in one who participates in judicial functions. When firing the probation officer, in contrast, the judge would be wearing his executive-branch hat, addressing the functioning of the probation department.[12] In both cases, the judge is taking a personnel

[12] The degree of separation, or commingling, of judicial and executive functions in the courts or in any other branch is a matter of choice for a state. The states are free to structure themselves as they see fit and need not adhere to the doctrine of separation of powers applicable to the federal government. *See Alden v. Maine*, 527 U.S. 706, 752 (1999). However, even federal judges could find themselves supervising some executive functions, if Congress were to delegate such tasks. The Constitution provides that the President appoints certain officers, but allows Congress to "vest the appointment of such inferior

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action. The focus of a proper functional analysis, though, should be on the nature of the program in which the personnel serve.

A similar functional analysis of a legislative assistant's job shows that the work is integral to the legislative function. Just as a judge must have complete confidence in a law clerk, so a legislator must have complete confidence in a legislative assistant. Judicial functions must be performed impartially and, of course, without regard to politics. In contrast, legislative functions are inherently political. The legislator's reliance on the legislative assistant therefore necessarily includes having the assistant be in harmony with the legislator on political issues.

Recognition of this difference makes it even more important to apply "Speech or Debate" immunity to employment decisions affecting personnel who are involved in the legislative process. Without such immunity, every personnel action could become a lawsuit, based, *inter alia,* on allegations of political differences and the First Amendment.

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officers, as they think proper, in . . . the courts of law. . . . " U.S. CONST. art. II, §2.

CONCLUSION

Amicus curiae the President *pro tempore* of the Senate of Pennsylvania requests that this Court reverse the judgment of the Court of Appeals for the reasons stated above.

Respectfully submitted,

JOHN P. KRILL, JR.
(*Counsel of Record*)
LINDA J. SHOREY
GEORGE A. BIBIKOS

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